TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 627.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

THE NEW RIVER COMPANY, WHITE OAK FUEL COMPANY, STUART COLLIERY COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

FILED NOVEMBER 6, 1923.

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1 In the District Court of the United States for the Southern District of West Virginia, at Charleston.

THE NEW RIVER COMPANY, A CORPORATION, WHITE OAK Fuel Company, a corporation, Stuart Colliery Company, a corporation, Dunnloop Coal & Coke Company, a corporation, Beckley Coal & Coke Company, a corporation, Mabscott Coal & Coke Company, a corporation, Cranberry Fuel Company, a corporation, plaintiffs,

versus

THE CHESAPEAKE & OHIO RAILWAY COMPANY, A CORPORATION, The Virginian Railway Company, a corporation, and the United States of America and the Interstate Commerce Commission, defendants; and Slab Fork Coal Company, a corporation, Scotia Coal & Coke Company, a corporation, South Side Company, a corporation, Turkey Knob Coal Company, a corporation, Coal Run Coal Company, a corporation, Branch Coal Company, a corporation, Beechwood Coal and Coke Company, a corporation, Greenwood Coal Company, a corporation, Laurel Creek Coal Company, a corporation, Quinnimont Coal Company, a corporation, Maryland-New River Coal Company, a corporation, Star Coal & Coke Company, a corporation, Ephriam Creek Coal & Coke Company, a corporation, and Stover Coal Company, a corporation, intervening defendants. } In Equity.

[Caption omitted.]

2 [Title omitted.]

BILL OF COMPLAINT AS AMENDED.

To the Honorable the Judges of the District Court of the United States for the Southern District of West Virginia Sitting in Equity.

I.

3 Your complainants, the New River Company, White Oak Fuel Company, Stuart Colliery Company, Dunnloop Coal & Coke Company, Beckley Coal & Coke Company, Mabscott Coal & Coke Company, Cranberry Fuel Company, all West Virginia corporations, bring this proceeding in equity against the Chesapeake and Ohio Railway Company, a corporation, and the Virginian Railway Company, a corporation, for the purpose of enjoining, preventing and restraining them from applying a certain rule

for distributing coal cars at the mines of your complainants and others similarly circumstanced, known as rule 4 of Circular CS–31, revised, in violation of their common law obligation as common carriers to furnish transportation in interstate commerce upon terms and conditions as favorable as those given by said common carriers, and each of them, for like traffic under similar conditions to other shippers and of the same obligation as defined in the interstate commerce act, approved February 4, 1887 (24 Stat. L. 379), as amended, including the amendments to said interstate commerce act contained in the transportation act, 1220, approved February 28, 1920 (41 Stat. L. 456).

And against the United States and the Interstate Commerce Commission to enjoin, set aside and annul the decision, ruling and order of the Interstate Commerce Commission issued under date of December 11, 1922, in proceedings brought by your complainants and designated as New River Company et al. vs. The Chesapeake and Ohio Railway Company, Interstate Commerce Commission Docket No. 12083, and New River Company et al. vs. The Virginian Railway Company, Interstate Commerce Commission Docket No. 12084, and the order of the Interstate Commerce Commission issued under date of April 15, 1920, upon the commission's own motion in the regulation of car service in so far as said decisions, rulings and orders

of the Interstate Commerce Commission authorize or require
4 the said carriers, defendant herein, to publish and apply the
rule of car distribution aforesaid, which said decisions, rulings and orders of the Interstate Commerce Commission were and are in excess of its statutory powers and were and are arbitrary and without warrant of law and, therefore, void.

And in support hereof your complainants allege and show:

II.

Your complainant, the New River Company, is a corporation of the State of West Virginia which controls, by stock ownership of all of the stock, the other corporations herein joined with it as complainants, to wit:

White Oak Fuel Company, a corporation of the State of West Virginia, operating bituminous coal mines within the said State, known as Scarbro, Whipple and Oakwood, which said mines are served severally by each of said carriers defendant herein in the transportation of goods, including coal and coke, in interstate commerce;

Stuart Colliery Company, a corporation of the State of West Virginia, operating bituminous coal mines within said State, known as Summerlee and Lochgelly, which said mines are served severally by each of said carriers defendant herein in the transportation of goods, including coal and coke, in interstate commerce;

Dunnloop Coal & Coke Company, a corporation of the State of West Virginia, operating a bituminous coal mine within the said

State, known as Dunnloop, which said mine is served severally by each of said carriers defendant herein in the transportation of goods, including coal and coke, in interstate commerce;

Beckley Coal & Coke Company, a corporation of the State
5 of West Virginia, operating a bituminous coal mine within said State, known as Beckley, which said mine is served severally by each of said carriers defendant herein in the transportation of goods, including coal and coke, in interstate commerce;

Mabscott Coal & Coke Company, a corporation of the State of West Virginia, operating a bituminous coal mine within said State, known as Mabscott, which said mine is served severally by each of said carriers defendant herein in the transportation of goods, including coal and coke, in interstate commerce;

And Cranberry Fuel Company, a corporation of the State of West Virginia, operating three bituminous coal mines within said State, known as Cranberry No. 1, Cranberry No. 2 and Cranberry No. 3, all in the State of West Virginia, which said mines are each of them served severally by each of the carriers defendant herein in the transportation of goods, including coal and coke, in interstate commerce.

III.

The Chesapeake and Ohio Railway Company, defendant herein, is a corporation of the State of Virginia, having its usual place of business in the State of West Virginia, engaged as a common carrier in the transportation of passengers and property, including coal, wholly by railroad between points in the State of West Virginia, including the locality of the mines of your complainants, and points in various other States, in interstate commerce and as such common carrier is subject to the provisions of the act of Congress approved February 4, 1887, known as the interstate commerce act, and of acts amendatory thereto and supplementary thereof, including the act known as the transportation act, 1920, approved February 28, 1920.

6 IV.

The Virginian Railway Company, defendant herein, is a corporation of the State of Virginia, having its usual place of business in the State of West Virginia, engaged as a common carrier in the transportation of passengers and property wholly by railroad between points in the State of West Virginia, including the mines of your complainants aforesaid and points in various other States in interstate commerce, and, as such common carrier, is subject to the provisions of the interstate commerce act, approved February 4, 1887, and acts amendatory thereto and supplementary thereof, including the act known as the transportation act, 1920, approved February 28, 1920.

V.

The Chesapeake and Ohio Railway Company and The Virginian Railway Company are independent common carriers each having access by its own rails or through trackage rights to the mines of your complainants and each of them and are engaged in the carriage of the coal, coke and other goods in competition as such carriers from said mines to the Atlantic seaboard and other points of destination in other States in interstate commerce.

VI.

The mines of your complainants aforesaid are located in Fayette and Raleigh Counties, West Virginia, in the heart of a field of bituminous coal production wherein is mined and produced a low volatile bituminous coal known as semianthracite or smokeless coal of West Virginia. In addition to the mines of your com-
7 plainants aforesaid there are many other mines in the State of West Virginia producing the same quality of coal served in interstate commerce in some cases by both lines of railroad and in very many other cases served singly by one or the other of the carriers defendant herein. All of said mines, whether local to one line of railroad or served by each of them, are in active competition in the marketing in other States of smokeless coal produced and mined in West Virginia and transported in interstate commerce by said The Chesapeake and Ohio Railway Company and said The Virginian Railway Company; the said coal areas wherein said smokeless coal is produced are known locally on the lines of the defendant carriers as the New River district.

VII.

The Interstate Commerce Commission is the administrative tribunal created by said interstate commerce act for the administration thereof, and whose authority, powers and limitations are in said act defined.

VIII.

The provisions of the interstate commerce act apply to common carriers engaged in the transportation of passengers or property in interstate commerce wholly by railroad or partly by railroad and partly by water when both are used under a common control management or arrangement for a continuous carriage or shipment. (Paragraph 1–A, Section I.)

The term " transportation," as used in the interstate commerce act, includes locomotives, cars and other vehicles, vessels, and all instrumentalities or facilities of shipment or carriage, irrespective
8 of any ownership or contact, express or implied, for the use thereof, and all services in connection with the receipt, de-

livery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported. (Paragraph 3 of Section I.)

By the interstate commerce act it is provided that it shall be the duty of every common carrier subject to the act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor and to establish through routes and just and reasonable rates, fares and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes. (Paragraph 4 of Section I.)

By the interstate commerce act it is made the duty of all common carriers to establish, observe and enforce * * * just and reasonable regulations and practices affecting * * * the facilities for transportation * * * and all other matters relating to or connected with the receiving, handling, transportation, storing and delivery of property subject to the provisions of this act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation and delivery of property subject to the provisions of this act upon just and reasonable terms and every unjust and reasonable clasification, regulation and practice is prohibited and declared to be unlawful. (Paragraph 6 of Section I.)

The term "car service" in the interstate commerce act is defined to include the use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars and other vehicles used in the transportation of property * * * by any carrier by railroad subject to this act. (Paragraph 10 of Section I.)

9 It is provided by the interstate commerce act that it shall be the duty of every carrier by railroad subject to this act to furnish safe and adequate car service and to establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service, and every unjust and unreasonable rule and regulation with respect to car service is prohibited and declared to be unlawful. (Paragraph 11 of Section I.)

It is provided by the interstate commerce act that it shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines, or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. (Paragraph 12 of Section I.)

By the interstate commerce act the Interstate Commerce Commission is authorized, by general or special orders, to require all carriers by railroad subject to this act, or any of them, to file with it from time to time their rules and regulations with respect to car

service and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares and charges for transportation, and be subject to any or all of the rules relating thereto. (Paragraph 13 of Section I.)

By the interstate commerce act it is provided that the commission may, after hearing on a complaint, or upon its own initiative without complaint, establish reasonable rules, regulations and practices with respect to car service by carriers by railroad subject to this act, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations or practices. (Paragraph 14 of Section I.)

By the interstate commerce act it is provided that it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatever or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (Paragraph 1 of Section III.)

By the interstate commerce act it is provided that nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute but the provisions of this act are in addition to such remedies. (Section 22; 22 Stat. L. 379.)

The obligations of carriers with respect to the distribution of cars are further defined in the interstate commerce act in connection with the provision for an additional remedy to enforce such obligation, as follows:

"That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the Act to which this is a supplement and all Acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: Provided, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question

of fact: Provided, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this Act or the Act to which it is a supplement." (Section 23; 25 Stat. L. 855.)

IX.

Pursuant to the provisions of said interstate commerce act, in last preceding article set out, each of carriers defendant herein for many years has established and applied rules for the distribution of its coal cars among its shippers during recurring periods when the supply of cars available for distribution for transportation of coal among the coal mines served by it did not equal the requirements of such mines, which said rules provided for the ratings of said mines and the distribution of cars to them so that each mine served by said carrier in the region should receive its just and reasonable proportion of the cars available on said railroad for distribution to the coal mines served by it. Prior to Federal control during the period of the war each of the defendant carriers, by its rules, provided for the rating and distribution of its cars among the mines wtihout reference to the car supply that was furnished by any other
12 carrier. The ratings of all mines under said rules represent, for purposes of car distribution, the daily capacity of the mines to produce and ship coal.

X.

By proclamation, dated December 26, 1917, the President took possession and assumed control of the railroads of the carriers defendant herein and operated the same through the Director General of Railroads from January 1, 1918, to and including February 29, 1920. Under said proclamation the railroads of the United States were permitted to be operated and were operated under the control and direction of the United States solely according to war needs, and so far as the United States might choose in combination as if they constituted a single carrier, regardless of the obligations of said roads when operated as independent and competing carriers according to the law when not under such Federal control. During the period of said Federal control the Director General of Railroads published and put in force through his car service section, and applied rules for the rating of coal mines other than anthracite and for the distribution of available empty cars to said mines. The said rules were contained in a circular of said car service section known as Circular CS–31. Rule 2 of said Circular CS–31 provided:

"Copies of orders for cars for a mine that is joint with any other carrier (steam, electric or water) shall be filed with the designated representative of each such carrier, such combinations of orders must not exceed the gross daily rating of the mine."

The rules contained in the circular aforesaid were subsequently revised and republished and put in force in Circular CS–31
13 revised, effective January 10, 1919. In said Circular CS–31, revised, the rule that had theretofore applied as rule 2 in the original circular was republished and put in force and applied without change in verbiage but was designated as rule 4 of the rules for the distribution of cars to coal mines in CS–31, revised.

Said rule 4, as contained in said Circular CS–31, revised, was continued in force and applied by the Director General of Railroads to the end of Federal control. Copy of the said Circular CS–31, revised, is hereto appended as Appendix A.

XI.

On February 29, 1920, the railroads of the United States were released from the Federal control under said proclamation of the President; by circular dated March 2, 1920, the Interstate Commerce Commission recommended that the carriers, both those defendant herein and all others subject to the interstate commerce act, continue in force the said Circular CS–31, revised, until such time as the experience of the carriers or the commission should dictate other and more appropriate rules for the rating and distribution of cars to coal mines; and in accordance with and in compliance with said action of the commission, the rules of said circular were continued in force by the carriers defendant herein.

Under date of April 15, 1920, the Interstate Commerce Commission, acting under its emergency powers, as defined in paragraph 15 of Section I of the interstate commerce act, ordered and directed the carriers to modify one of the rules contained in said Circular CS–31, revised, which said modification is not here involved, but otherwise recommended that the other rules of said circular, including
14 rule 4 aforesaid, be continued in force and applied, and in accordance with and in compliance with said action of the commission, the rules of said circular were continued in force by the carriers defendant herein.

XII.

On or about July 8, 1920, the carriers defendant herein applied to the Interstate Commerce Commission for permission to abrogate rule 4 and to put into effect the rule laid down in the Illinois case.

This application was refused by the commission and because of said refusal said rule 4 was continued in effect by the carriers defendant herein.

Thereafter on, to wit, January 11, 1921, your complainants filed complaints before the Interstate Commerce Commission separately against the Chesapeake and Ohio Railway Company and the Virginian Railway Company, respectively, alleging that said rule 4 of Circular CS–31, revised, was unjust and unreasonable in violation of Section I of the interstate commerce act as amended, par-

ticularly paragraphs 11 and 12 of said Section I, and unduly preferential of complainant's competitors and prejudicial of complainants in violation of Section III of said act. These two cases are known, respectively, as Interstate Commerce Commission Docket Nos. 12083 and 12084. The above numbered separate complaints were consolidated with each other and certain other similar complaints, known as Interstate Commerce Commission Dockets Nos. 12081 and 12082, and were assigned for hearing, brief, and argument and decision to Division V of the commission; were duly briefed, heard, and argued before said commission and the decision of the commission thereupon was issued by said Division V on
15 June 21, 1921, Fairmont and Cleveland Coal Company vs. B. & O. R. R. Co. (62 I. C. C., 269). Copy of said decision is hereto appended as Appendix B.

In said decision the commission found that said rule 4 of Circular CS–31, revised, was unjust and unreasonable and unduly prejudicial of complainants and others similarly circumstanced and unduly preferential of the mines on each of the carriers defendant herein that were served singly by each such carrier; held and found that a certain rule laid down in the case of In re Irregularities in Mine Ratings (25 I. C. C. 286), known as the Illinois case, was the just and proper rule and, while stating "We have not required that car service rules be filed as tariff schedules," directed as follows: "We shall expect, however, that defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies thereof with us."

XIII.

The commission in said decision found that a certain rule of car distribution, in lieu of said rule 4 of Circular CS–31, revised, to wit, the rule of the Illinois case, would be just and reasonable, and authorized and directed the carriers to establish and apply said rule in the future. This rule, so authorized and directed, limited the right of your complainants on days when they ordered cars from both their connections to order from each only 75 per cent of the mine rating. In reliance on and pursuant to such authority and direction the carriers defendant herein amended their car service rules so as to conform with said findings of the commission and filed the said Illinois rule of car distribution. By said action of the commission said rule 4 was abrogated and the Illinois rule came for the time being into effect as the rule prescribed by the commission.

16

XIV.

Complaints substantially similar to those involved in Dockets 12081–12084 were filed by certain operators of mines, similarly circumstanced, located in Illinois and Indiana, against carriers serving mines in those States, which said complaints were known as Inter-

state Commerce Commission Dockets Nos. 12362 and 12399, respectively, and are collectively known as Bell & Zoller Coal Company et al. vs. Baltimore & Ohio Southwestern Railroad Company et al. Hearing was duly had upon said latter numbered complaints and a tentative report upon such record was made by an examiner of the commission in which it was proposed to confirm the decision in the Fairmont & Cleveland Coal Company cases, Dockets Nos. 12081–12084. Petition had in the meantime been filed to reopen for further consideration Dockets Nos. 12081–12084 and the commission did reopen said cases and consolidate the same for argument with the records made in the Bell & Zoller Coal Company cases. Argument was had upon the records thus consolidated in all of these cases before the commission, and on December 11, 1922, the commission entered its decision, ruling, and order, copy of which is hereto appended as Appendix C. Said decision is known as Bell & Zoller Coal Company et al. vs. Baltimore & Ohio Southwestern Railroad Company et al., which case includes the cases, Dockets Nos. 12081–12084, and will hereinafter be referred to as the Bell & Zoller decision. In its decision, ruling, and order (Appendix C) the Interstate Commerce Commission found, in reversal of its previous decision, ruling, and order, that rule 4 of Circular CS–31, revised, was not "in principle unjust or unreasonable or unduly prejudicial" and that "our former conclusions in the Fairmont cases—are reversed,"
and the Commission entered an order to dismiss the com-
17 plaints in all of the cases recited in which an abrogation of said rule 4 had been sought and previously granted. By thus reversing its previous conclusions and directions in the Fairmont case the commission annulled as of the date of December 11, 1922, its previous action by which it abrogated rule 4 and substituted the Illinois rule therefor, and thereby, by its own action, reestablished rule 4 as the rule to be followed by the railroads. In its decision the commission found inter alia:

"The operation of rule 4 is shown by the following example: A joint mine with a gross daily rating of 50 cars located on carriers A and B orders all of its cars from carrier A which has an 80 per cent car supply. The joint mine will receive the same number of cars as a local mine with a daily rating of 50 cars on carrier A. However, if carrier B has a 50 per cent car supply and the joint mine divides its order equally between the two carriers it will receive 80 per cent of 25 cars, or 20 cars, from carrier A, and 50 per cent of 25 cars, or 12.5 cars, from carrier B, a total of 32.5 cars, compared with 40 cars received by the local mine on carrier A. Should the joint mine order more than half its cars from the carrier with the greater car supply this will change the figures somewhat, but in no instance will the joint mine receive as many cars as the local mine served by carrier A if the orders are divided. The complainants concede that the joint mine will, in the aggregate, receive more cars than the local mine located on the carrier with the

lesser car supply, and it possibly may receive more cars on the average than the local mines of similar rating on both carriers."

By said decision, order, and ruling of the commission each of the carriers defendant herein is authorized and required to limit its car service to your complainants, and others similarly circumstanced, below the car service which it furnishes to the local mines served by it, as in said commission's report set out, and said limitation of obligation is arrived at, as to each carrier, by reason of car service and transportation furnished to your complainants, and others similarly circumstanced by another independent and competing carrier.

Under said decision, order, and ruling if any of your complainants in time of car shortage has availed itself of its right of shipment by the carrier which has the largest available percentage of car supply, to ship so much of its coal as said carrier can take, and then desires to ship the remainder of its goods by the other independent and competing carrier, said other carrier is prohibited from giving any transportation service whatever to said complainant solely because of the first carrier having taken a portion of the goods which your complainant has desired to ship by it. Thus if one of your complainants desires to ship all its coal to the Atlantic seaboard by one of said carriers and orders cars therefor, and said carrier, by reason of having only an 80 per cent car supply is able to transport only 80 per cent of said coal, the other of said carriers on whose line complainant is located, and which has a 40 per cent car supply and by whom your complainant desires to ship the balance of its coal to the Atlantic seaboard, is prohibited from giving any transportation service to your complainant although to other shippers located on its road, desiring to ship coal by it it is giving a 40 per cent service.

XV.

Acting under and because of said decision, order, and ruling of the commission of December 11, 1922, and as your complainants are informed and believe and therefore allege, in fear and duress of the penalties imposed by law in case of violation of any decisions, orders, or rulings which the commission is authorized to make, the carriers, defendant herein, have put in force, and notified your complainants that they have put in force, rule 4 of Circular CS–31, revised, effective in the case of the Chesapeake and Ohio Railway Company on February 10, 1923, and in the case of the Virginian Railway Company on February 1, 1923.

XVI.

On, to wit, January 11, 1923, your complainants, joined with certain other operators of coal mines similarly circumstanced, filed with the Interstate Commerce Commission a petition to reopen said proceedings known as Dockets 12081–12084, inclusive, but the Inter-

state Commerce Commission has failed to take any action thereon and the decision, ruling, and order made December 11, 1922, and the action of the carriers defendant herein putting in force, effective February 1 and February 10, respectively, said rule 4 continue in full force and unmodified.

XVII.

The mines of your complainants are in large part deep shaft mines which required for their opening and development a large capital investment much in excess of that required for the opening or development of the ordinary drift or slope mine; said shaft mines carry a large overhead charge and by reason of the capital expenditure required in their development and said large overhead charge are peculiarly dependent for successful and profitable operation upon continuous and steady operation at or near their capacity and upon transportation facilities and service which will permit of this.

20 The properties where said mines were developed lay between the locations of the Chesapeake and Ohio and the Virginian Railways and were readily capable, by the building of short railroad lines, of being brought into connection with both of said trunk lines. An investment of large sums was made in the development of said mines and the building by the investors therein of two railroads, to wit, the White Oak Railway and the Piney River and Paint Creek Railroad, to connect the mines with both trunk lines in reliance on the geographical location of said properties being such that they were capable of being served and would be entitled to be served by both of said lines, and in reliance on securing, by the full service of each of said lines as a competing and independent carrier, the transportation facilities which were essential to the successful operation of the properties. In 1917 after said White Oak Railway and Piney River and Paint Creek Railroad had been operated for a period of five years by the Chesapeake and Ohio and the Virginian as joint lessees, during which time the mines located in the leased lines had had from each of said lessors full transportation service free from the restrictions as to such service now imposed by said rule 4, said railroads were, at the solicitation of the trunk lines, sold and conveyed one to the Chesapeake and Ohio Railway Company and the other to the Virginian Railway Company with full reciprocal trackage rights for a period of 99 years granted by each purchasing trunk line to the other trunk line, thereby assuring for said period of 99 years full access by both trunk lines to the mines located on each of the purchased roads. The stock of both the White Oak Railway Company and the Piney River & Paint Creek Railroad Company, as well as the stock of the complainant mining companies whose properties had been developed and connected with the trunk lines by the construction of said railroads, was then owned by

21 the New River Company as it had previously been by the New River Fuel Company, of which the New River Company was the successor.

In order to assure to the mines located on said roads the continued full service of both of said trunk lines essential to their successful operation, it was stipulated by the New River Company that as part of the consideration for said sale an agreement should be entered into by the Chesapeake and Ohio Railway Company and the Virginian Railway Company, respectively, with the New River Company that the trackage rights to be reciprocally granted by each purchasing trunk line to the other trunk line over the railroads purchased should be maintained in full force and effect for said period of 99 years, and that all the terms of said trackage agreements should during said period be fully performed and observed by the trunk lines; it was also stipulated that the proposed agreement of purchase and sale, including said agreement with the New River Company as to the continuance of the trackage agreement, and said trackage agreement itself, should not go into effect until they had been submitted to the Interstate Commerce Commission for its consideration and formal or informal approval. All of said agreements were so submitted, and the Interstate Commerce Commission making no objection thereto, the sale was consummated in accordance with said agreements. By said agreement entered into by said The Chesapeake and Ohio Railway Company and the Virginian Railway Company the right was vested in the New River Company to the continuance of the full service of said carriers over said road to the mines and properties located thereon. The denial of said service by either of said carriers on account or by reason of certain shipments having been made over the other of said carriers, constitutes an unlawful
22 denial of the service which by said agreement was intended to be secured and was secured to The New River Company for the mines located on said purchased railroads.

XVIII.

There is at the present time a shortage of cars on both the defendant carriers, neither having currently a supply of cars available for the loading and transportation of coal equal to the requirements therefor of the mines served by it, including the mines of your complainants.

XIX.

If said carriers furnish cars only in accordance with said decision, ruling, and order of December 11, 1922, and said rule 4 of CS–31, revised, the supply of cars so furnished will be entirely inadequate to transport the coal which the mines of your complainants have been developed to produce and are producing and which they have available for shipment and desire to ship.

XX.

Your complainants desire to use each defendant carrier to ship in interstate commerce the full amount of coal which said carrier can

receive and transport for your complainants on a parity with others offering a similar amount of tonnage to said carrier for such shipment, and your complainants and each of them are prepared to ship and desire to ship by each of said carriers coal in excess of the amount which said carrier can transport on such a parity. Your complainants are prepared to pay and offer to pay in the manner provided by law the freight charges on all coal which the defendant carriers will accept for shipment.

23 XXI.

Said decision, ruling, and order of the Interstate Commerce Commission of December 11, 1922, and said rule 4 put into effect by the defendant carriers in compliance therewith, constitutes an encroachment upon and a curtailment and denial of the legal right of your complainants and each of them to the service of a common carrier in interstate commerce on a parity with other shippers offering similar shipments to said carrier and of the carrier's legal duty and legal and property rights as a common carrier to serve your complainants as such common carrier and deprives your complainants, and each of them, of their property and legal rights without due process of law and of the equal protection of the laws assured by the constitutions and laws of Virginia, of West Virginia, and of the United States.

XXII.

Said decision, ruling, and order and said rule 4 are discriminatory against your complainants and each of them as producers and shippers of a certain particular commodity, to wit, coal, as against shippers of other classes of merchandise who, throughout the United States, when by their geographical location they are able to ship by more than one common carrier, have and enjoy the right of service as to transportation of goods which they desire to ship by and offer for shipments to one of said carriers on a parity with other shippers offering similar shipments by said carrier, which said service they have and enjoy regardless of what shipments may have been made of other goods by another carrier.

24 XXIII.

Said decision, ruling and order of December 11, 1922, and said rule 4 imposes the obligation on a common carrier to inquire and ascertain what shipments have been made in interstate commerce by a shipper through another and independent and competing carrier and, if a certain amount of coal has been shipped by said independent and competing carrier, entirely to deny and refuse any transportation in interstate commerce to the shipper tendering goods for shipment, or partly to deny and refuse such transportation if some shipments have been made by such other competing carrier, thereby permitting and requiring such carrier to discriminate against a shipper who has made use of a competing common carrier and in favor of a

shipper who deals exclusively with one of the competing carriers, and such discrimination is contrary to the laws of the United States and of the States of Virginia and West Virginia.

XXIV.

Said decision, ruling and order of December 11, 1922, authorizes and requires each of two competing and independent common carriers, when a certain particular commodity, to wit, coal, is produced and offered for shipment to any extent in excess of what the car supply of such carriers makes it possible for them to transport, to cease to act as a separate and independent carrier and to cease as such to furnish to shippers tendering goods to it equal and proportionate service according to the goods offered to it and the cars which it has available and authorizes and requires the two competing and independent carriers to act in combination one with the other, and, in such combination together, to give to the shipper only such
25 service as he would be entitled to if the two independent carriers were in fact a single corporate carrier; and, if one of said carriers has transported a certain amount of goods for the shipper, authorizes and requires the other carrier to refuse any transportation of goods tendered to it. It is contrary to the laws of the United States and of the States of Virginia and West Virginia for two independent and competing carriers thus to combine to limit the facilities which, as common carriers, they will afford to shippers tendering to them separately as independent common carriers goods to be shipped; there is no power vested by law in the Interstate Commerce Commission to authorize or require by a decision, ruling or order two railroads which are independent and competing carriers serving the same territory, to thus act and operate in combination, and in such combination so to limit facilities which a shipper offering for shipment goods to them separately as independent carriers is by law entitled to; and such combination and limitation is in violation of the laws and statutes of the United States and of the States of Virginia and West Virginia and constitutes under said laws and statutes an illegal combination in restraint of trade and commerce and of interstate trade and commerce, and it is a violation and denial of the legal right of each of your complainants to deal with an independent common carrier as such, and to have transportation from each such carrier without discrimination because of other shipments which it has made by another separate and independent common carrier.

XXIV.

The Interstate Commerce Commission has by said decision, ruling and order of December 11, 1922, attempted to curtail and deny the legal right of a shipper to transportation service in interstate
26 commerce from a common carrier on a parity with other shippers offering similar goods for shipment, for the purpose of

bringing about what a majority of said commission now conceives to be a desirable adjustment of labor conditions as between different mines; no authority is vested by law in said commission to adjust mine labor conditions or to use its powers of regulation of railroads and common carriers, directly or indirectly, for any such purpose; said decision, ruling and order of the commission is in fact arbitrary, unjust, and unreasonable in its effect upon mine labor conditions in that it will, in times of car shortage as compared with times of full car supply, disproportionately affect and curtail the production of mines accessible to two or more carriers as compared with those accessible to only one carrier, thereby disorganizing the labor and production organization of said mines accessible to and customarily availing themselves of the services of two or more carriers, and if allowed to take effect will seriously curtail production of coal in the United States in that, through the great variation which it arbitrarily and artificially imposes on the production of mines which are so located as to be accessible to two or more roads and which normally use and have been developed to use the transportation service of said two or more roads, it will demoralize the labor and production organization of such mines so as to render it impossible for them to retain a working force and organization proportional to their normal capacity and output.

XXVI.

It is a common law, statutory and property right of each of your complainants to have goods which it desires to have shipped by a common carrier in interstate commerce accepted and received
27 for transportation without discrimination as to transportation and car supply between it and other shippers desiring to have similar goods shipped by the same carrier and there is a reciprocal legal duty and obligation on the carrier, regardless of what shipments the shipper may have made of other goods over another competing road, to receive and ship the goods offered by a shipper on a parity with other parties so offering goods to it for shipment and without discrimination between parties so tendering such shipments; if your complainants are deprived of the transportation rights to which they are entitled their investments and property in the mines owned by them and which are dependent on such transportation will be lost or seriously impaired.

XXVII.

No right or power is by law vested in the Interstate Commerce Commission to deprive a shipper of his right, on a parity with others offering goods for shipment, to the service of a common carrier, or to prohibit the carrier from performing such service, and the decision, ruling and order of December 11, 1922, of the Interstate Commerce Commission and the denial by the Chesapeake and Ohio Railway

Company and the Virginian Railway Company, under duress of said decision, ruling and order made by the Interstate Commerce Commission as hereinbefore stated, of service in interstate commerce to your complainants on a parity with other shippers is without warrant in law.

XXVIII.

The curtailment in accordance with said decision, ruling and order of December 11, 1922, and said rule 4 of the said transportation service in interstate commerce of the defendant carriers to your complainants and each of them, will, if said decision, ruling, order and rule are permitted to operate, result in great loss and irreparable damage to your complainants and each of them and your complainants have no plain, sufficient and adequate remedy at law and can have adequate relief only through the exercise of the equity powers of this honorable court.

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XXIX.

Your complainants and each of them are organized as to capital investment, mine development, supplies and equipment, working capital, administrative organization, labor force, housing facilities and selling organization to mine, handle and market the full amount of coal which, with the full service of each of said defendant carriers as an independent and competing carrier without discrimination between your complainants and other shippers offering shipments to said carriers, your complainants are entitled to by reason of the geographical location of their mines and the access of each of said carriers thereto; and your complainants have entered into contracts for the sale of coal based on the output which the furnishing of such facilities would enable them to transport and market. Said investment and organization have been made and said contracts have been entered into by your complainants and each of them in reliance on the transportation which they are lawfully entitled to from each of the carriers defendant and which they have uninterruptedly had and enjoyed for a long period of years, except during the period of Federal control when the railroads of the United States, including those of the defendant carriers, were operated as a unit solely according to war needs, and for a short period after the termination of said period of Federal control, during which said rule 4 was permitted by the Interstate Commerce Commission to remain in force, and except as the car supply of your complainants was by the original decision in the Fairmont case restricted slightly in comparison with the restriction now attempted to be imposed. If said rule 4, CS–31, revised, is permitted to be applied your complainants will suffer great and irreparable damage in the loss of returns on their investment, wastage and disuse of their equipment, wastage and lack of use for their houses and supplies, laying off, demoralization and loss of their labor force,

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lack of employment and demoralization of their selling organization, loss of the profits under existing contracts by reason of inability to deliver the coal contracted to be delivered thereunder, damage claims for nondelivery, and loss of sale of coal and contracts of sale which, except for the denial and refusal of the transportation facilities to which they are entitled, your complainants are in position to make.

I. Wherefore, your complainants, and each of them, pray: That there be ordered and granted by the court a temporary stay or suspension of the operation of said decision, ruling and order of December 11, 1922, of the Interstate Commerce Commission and of said rule 4 of Circular CS–31, revised.

II. That a temporary or interlocutory injunction be issued, restraining and enjoining, until the further order of this court, the United States of America and the Interstate Commerce Commission from enforcing or applying said decision, ruling and order of December 11, 1922, and said United States of America and Interstate Commerce Commission and said The Chesapeake and Ohio Railway Company and the said The Virginian Railway Company, and each of them, from enforcing or applying said rule 4 of Circular CS–31, revised, or from restricting the supply of cars to your complainants, or any of them, in accordance with said rule.

III. That this court adjudge, order, and decree that rule 4 of Circular CS–31, revised, now published by the carriers defendant herein, effective as of February 1, 1923, and February 10, 1923, respectively, is in violation of the legal rights of your complainants, and each of them, to transportation service from each of said carriers in interstate commerce and is null and void and without warrant in law, and that same be set aside and annulled.

IV. That this court adjudge that the decision, order, and ruling of the Interstate Commerce Commission of December 11, 1922, in so far as it authorizes or requires the carriers defendant herein to put in operation said rule 4 of Circular CS–31, revised, or to restrict the transportation service and the furnishing of cars by said carriers in interstate commerce and is null and void and without war- of December 11, 1922, or in accordance with said rule 4 of Circular CS–31, revised, is beyond the lawful right or authority of the United States of America and the Interstate Commerce Commission and is without warrant in law and is null and void, and that said decision, order, and ruling of December 11, 1922, and said rule 4 of Circular CS–31, revised, is beyond the lawful right or authority of the United

V. That the United States of America and the Interstate Commerce Commission and the carriers defendant, each and all, be perpetually restrained and enjoined from restricting, in accordance with said decision, ruling, and order of December 11, 1922, of the Interstate Commerce Commission and with rule 4 of Circular CS–31, revised, of the transportation service in interstate commerce and of said carriers defendant to your complainants and from so restrict-

ing the said service by or through any other decision, ruling, order, or rule to the same effect.

31 VI. That your complainants, and each of them, may have such other and further relief as to equity may appertain and as may be deemed by this honorable court fit and proper.

THE NEW RIVER COMPANY,
By ROBERT H. GROSS, *President.*
WHITE OAK FUEL COMPANY,
By ROBERT H. GROSS, *President.*
STUART COLLIERY COMPANY,
By ROBERT H. GROSS, *President.*
DUNNLOOP COAL & COKE COMPANY,
By ROBERT H. GROSS, *President.*
BECKLEY COAL & COKE COMPANY,
By ROBERT H. GROSS, *President.*
MABSCOTT COAL & COKE COMPANY,
By ROBERT H. GROSS, *President.*
CRANBERRY FUEL COMPANY,
By ROBERT H. GROSS, *President.*

[Jurat showing the foregoing was duly sworn to by Robt. H. Gross. Omitted in printing.]

32 *Appendix A to amended bill.*

United States Railroad Administration.

Director General of Railroads.

CHESAPEAKE & OHIO RAILROAD.

Circular CS–31 (Revised).

RICHMOND, VA., *Jan. 6, 1920.*

To all coal operators:

The following rules are promulgated to govern uniformly the rating of coal mines (other than anthracite) and car distribution to such mines. They will supersede the rules contained in car service section Circular CS–31, issued at Richmond, Va., October 4, 1918, and are effective beginning January 10, 1920:

Rules for rating for car distribution purposes coal mines (other than anthracite) loading coal at mine tipples.

The following rules shall govern the rating of coal mines (other than anthracite) as the basis for the distribution of empty cars to such mines during periods of car shortage:

(a) The daily capacity of each mine (other than mines covered by paragraphs b and c) shall be determined by taking the total coal

tonnage shipped by the mine during the preceding month, dividing it by the number of hours worked in producing it (see paragraph e) and multiplying the quotient by the number of hours in the recog-
33 nized work day (not more than ten hours) of the individual mine. The result shall be termed the "daily rating" of such mine, and shall be the basis on which cars shall be distributed to it during periods of car shortage.

(b) The daily capacity of a mine which is served jointly by or for two or more carriers (steam, electric or water) shall be determined by taking the total tonnage shipped by the mine via all such carriers during the preceding month, dividing it by the number of hours worked in producing it (see paragraph e) and multiplying the quotient by the number of hours in the recognized work day (not more than ten hours) of the individual mine. The result shall be termed the "gross daily rating" of such mine, and shall be the basis on which cars shall be distributed to it during periods of car shortage; provided, that if track or other limiting conditions further restrict its ability to ship via the Chesapeake & Ohio Railroad, such conditions shall be the limiting factor for the Chesapeake & Ohio Railroad's daily rating of such mine.

(c) The daily capacity of a mine delivering part of its output to a coking plant, to locomotives at the tipple or to local trade shall be determined by taking the total coal tonnage shipped in railroad cars during the preceding month, dividing it by the number of hours worked (see paragraph e) and multiplying the quotient by the number of hours in the recognized work day (not more than ten hours) of the individual mine. The result shall be termed the "daily rating" of such mine and shall be the basis on which cars shall be distributed to it during periods of car shortage.

(d) When the fires are withdrawn from part (or all) of the ovens at an operation coking part of its output, for the purpose of shipping coal production formerly used in charging ovens, the daily rating of the mines shall be increased to include the average tonnage per day so diverted in the previous month, until the beginning of the next rating period, at which time the daily rating of the mine shall be determined in accordance with paragraph a or c, due allowance being made for such average tonnage so diverted in computing
34 the new daily rating. A corresponding decrease of the mine's rating will be made when the ovens are again placed in blast.

When a mine that has been coking its entire output desires to ship coal and the fires are withdrawn from part (or all) of its ovens, it shall be given a daily rating for coal shipments corresponding to the average tonnage of coal formerly coked until the beginning of the next rating period, at which time the daily rating of the mines shall be determined in accordance with paragraph a or c.

(e) In determining the number of hours worked in each day at a mine, time will be counted from the established time for beginning work (or the actual time if earlier or later than the established time)

on the tipple until the dumping of coal finally ceases for the day, making deductions for the noon intermission when it is taken, and for the time lost by reason of being blocked with loads, waiting for additional empty cars, or other railroad disability; provided, that if a greater number of hours is worked in the mine than on the tipple, the mine hours must be reported also, and the number of hours worked in the mine must then be used as the number of hours worked in producing the coal. (See paragraphs a, b, and c.) Time may be deducted for railroad disability only when such railroad disability actually reduces the quantity of coal dumped that day. Time may be deducted when tipple is used for dumping coal into locomotives only when the tipple can not be simultaneously operated for loading cars.

(f) Daily ratings determined in accordance herewith will be revised monthly and made effective on the 10th of the month following the month's performance on which the rating is determined.

(g) If a mine be idle for a period of one full calendar month or more, the last rating determined will be the rating when work is resumed, provided the mine conditions be substantially the same as when the mine closed.

(h) Rating for development purposes based on current performance will be assigned to a new operation in previously undeveloped coal. A new mine will be furnished with a supply of cars
35 sufficient to enable it to work freely in the course of development for a period not exceeding 6 months after shipments are begun; provided, that if theretofore its ability to load 150 tons per shift (not, however, to exceed 2 shifts per day) is established, it shall then be rated. A new operation of any other character shall be entitled to a development rating for a period of one month after shipments are begun.

(i) Each mine shall report on a prescribed form to the chairman car allotment commission, Huntington, W. Va., promptly at the close of each day:

1. The number of hours in the recognized workday;
2. The established time for beginning the day's work;
3. The actual time work was begun this day on tipple;
4. If the noon hour intermission is taken, how long;
5. Time lost during the day account:
   Waiting for railroad cars or other railroad disability, ------ hours;
   Strikes or mine labor shortage, ------ hours;
   Mine disability, ------ hours;
   No market, ------ hours;
   All other causes, ------ hours;
6. Time work on tipple ceased for day;
7. Number of hours worked to-day on the tipple, ------, and in the mine, ------ (see paragraph e);
8. Number of net tons of coal loaded for shipment via Chesapeake & Ohio Railroad;

9. Total number of net tons of coal produced and shipped via each other outlet;

10. Number coal loaders working to-day in mine.

Joint mines shall furnish this daily report to each carrier serving them.

If after notice from the railroad an operator persistently fails to furnish this daily report, he will be penalized by curtailment of his car supply to the amount of 25 per cent of distribution for one week.

(j) At the close of each month the mine manager or superintendent in charge of actual operation shall report under oath on a
36 prescribed form to the chairman car allotment commission, Huntington, W. Va., having jurisdiction, separately for each mine for each month, as follows:

1. Number of hours in the recognized workday;

2. Total number of net tons of coal produced;

3. Total number of net tons of coal shipped via the Chesapeake & Ohio Railroad;

4. Total number of net tons of coal shipped via each other outlet;

5. Total number of hours worked during the month (see paragraph e);

6. Average number of coal loaders working daily in mine during month;

7. Total time lost during month account:

Waiting for railroad cars or other railroad disability, ------ hours;
Strikes or mine labor shortage, ------ hours;
Mine disability, ------ hours;
No market, ------ hours;
All other causes, ------ hours.
Total, all mine causes, ------ hours.

This report must be forwarded not later than the 3rd of the month following that for which the statement is furnished; provided, that where the location of the mine makes it inconvenient to furnish a report under oath by that date, a report not under oath may be forwarded, and the sworn report forwarded not later than one week after. Joint mines shall furnish this monthly report to each carrier serving them.

(k) If an operator declines or persistently fails to make reports or to make accurate reports to the carrier as required herein, it will be assumed that the mine worked full hours in producing and loading into railroad cars the tonnage shipped and the daily rating will be computed accordingly.

(l) A statement showing the mine ratings which will govern the car distribution for the succeeding month will be furnished as
37 soon as such ratings are ascertained to such coal mines on this railroad as make application for the same. Such statement will show the mine rating of each mine and the total mine ratings of each coal loading district and the aggregate ratings for all mines

and all districts on this railroad, and the percentage of each such figure to the total.

Rules governing the distribution of cars to coal mine tipples (other than anthracite).

Whenever the available car supply in any region (or district) is such that all orders for cars can be filled, cars shall be placed at each mine in accordance with its daily order, except that whenever a mine holds unbilled coal loads, it shall be entitled only to empty cars equal in number to the difference between the rating last established for the mine and the number of unbilled coal loads so held. Whenever the available car supply is such that all orders for cars cannot be filled, each mine shall be given its pro rata share of cars in accordance with the following rules:

1. The daily rating, or the daily order for cars if less than the rating, shall be the basis for car distribution.

2. Grouping of mines, or pooling of cars as between mines, will not be permitted.

3. On application of mine operators and in the discretion of the railroad, cars may be placed on such days only and at such mines only as may elect to work, and overs and shortages in car supply resulting from this distribution shall be adjusted on succeeding days.

4. Each mine operator shall report to the local car distributor at 4 p. m. daily:

(a) Number of unconsigned loads on hand at 7 a. m.

(b) Number of empty and partly loaded cars on hand at 7 a. m.

(c) Additional number of empty cars received during the day.

(d) Aggregate number of empty cars received during the day.

38 (e) Number of cars loaded during the day.

(f) Number of empty cars standing over at close of day.

(g) Number of empty cars standing over at close of day which were received prior to 7 a. m., ------cars; and prior to 10 a. m. ------ cars.

(h) Number of partly loaded cars under tipple at close of day.

(i) Number of unconsigned loads on hand at close of day.

(j) Additional number of empty cars required for loading following day.

Copies of orders for cars for a mine that is joint with any other carrier (steam, electric, or water) shall be filed with a designated representative of each such carrier. Such combinations must not exceed the gross daily rating of the mine.

5. The recognized standard car for coal car distribution is 50 tons. Others are compared thereto by tenths of a car; i. e., 80,000 pounds capacity equals eight-tenths (.8) of a car; 140,000 pounds capacity one and four-tenths (1.4) cars, etc., and cars must be charged and car distribution records maintained accordingly.

6. (a) All cars placed at a mine during each period of 24 hours ending at 10 o'clock a. m. (or when Sundays or holidays intervene,

the longer period ending at 10 o'clock a. m. of the day immediately succeeding the Sunday or holiday) shall be charged against the mine on the day when such period ends; provided, that if the cars placed at 7 o'clock a. m. (not including partly loaded cars) do not equal or exceed in number 25 per cent of the daily rating (or order if less than the rating) then no cars will be charged against the mine that day except such as are loaded on that day.

(b) Cars placed between 10 o'clock a. m. and the time the mine ceases work for the day, if loaded or partly loaded on the day placed, will be charged against the mine on that day.

39 (c) All cars of other than railroad ownership commonly called "private cars") placed for owners' loading will be considered as ordered.

7. The pro rata share of cars to which each mine is entitled, except as provided in rule 9, shall be based on its rating (or order when less than its rating). When a mine has empty or partly loaded cars which were placed prior to 7 a. m., or unconsigned loads standing over at the close of the day's business, such cars shall be charged against it each day thereafter while they are detained, except as otherwise provided in rule 6.

If on any day a mine be furnished with cars totaling less than 100 per cent of its rating (or order if less than its rating) and for any cause whatever other than railroad responsibility fails to load the entire number, the mine shall be considered as having been furnished 100 per cent of its requirements, and its order shall be arbitrarily reduced to the number of cars furnished.

8. Private cars and such cars as are assigned to mines by the car service section, United States Railroad Administration, will be designated as "assigned" cars. All other cars will be designated as "unassigned" cars.

9. If the number of assigned cars placed at a mine during any period, as provided in rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply pro rated to the other mines, based on a revised percentage by reason of such elimination.

10. If the number of assigned cars placed at a mine during any period, as provided in rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share.

11. If a mine receives more or less cars than it is entitled to during any period, as provided in rule 6 (and after eliminating assigned cars as provided in rule 9), it will be charged with a surplus or credited with a shortage accordingly, and the discrepancy adjusted as promptly as practicable.

40 12. A statement showing car distribution for the preceding month will be furnished as soon as such distribution is ascertained, to such coal mines on this railroad as make application

for the same. Such statement will show the car distribution of each mine, the total car distribution of each coal loading district, the aggregate distribution for all mines and all districts on this railroad, and the percentage of each such figure to the total.

13. Such additional information as may be necessary will be asked for from time to time.

W. L. Booth,
Superintendent Transportation.

41 *Appendix B to amended bill.*

Interstate Commerce Commission.

No. 12081.*

Fairmont & Cleveland Coal Company vs. Baltimore & Ohio Railroad Company.

Submitted May 24, 1921. Decided June 21, 1921.

Defendants' practices in distributing cars to mines of complainants for coal loading found to be unreasonable and unduly prejudicial. Reasonable and nonprejudicial rules prescribed for the future.

James W. Carmalt for complainants and interveners supporting complaints.

Francis R. Cross for Baltimore & Ohio Railroad Company; James Stillwell for Monongahela Railway Company; W. H. T. Loyall for Virginian Railway Company, and W. S. Bronson for Chesapeake & Ohio Railway Company.

P. H. Greenlaw and Thomas L. Phillips for Fifth and Ninth Districts Coal Bureau; George T. Bell, George S. Brackett, and G. H. Caperton for Northern West Virginia Coal Operators' Association and local mine operators in the New River district, and F. H. Harwood for Illinois Coal Traffic Bureau, interveners.

Report of the Commission.

Division 5, Commissioners Clark, Aitchison, and Potter.

By Division 5:

These cases involve the same issue, were heard together, and will be disposed of in one report.

42 Complainants are corporations in West Virginia engaged in the operation of bituminous coal mines. The mine of complainant in Nos. 12081 and 12082, known as the Parker Run mine,

* This report also embraces No. 12082, Same vs. Monongahela Railway Company; No. 12083, New River Company et al. vs. Virginian Railway Company; and No. 12084, Same vs. Chesapeake & Ohio Railway Company.

is located at Fairmont, W. Va. Complainant owns and maintains about 1.5 miles of siding on its mining property, connected at the west end with the Baltimore & Ohio Railroad and at the east end with the Monongahela Railway. The complainants in Nos. 12083 and 12084 operate 11 mines in the New River district, W. Va., which are served by the Chesapeake & Ohio and Virginian Railways, as will hereinafter be more fully explained. The New River Company controls by stock ownership the other complainant corporations in the New River district.

It is alleged in substance that the rules, regulations, and practices governing the distribution of cars for the transportation of coal from the mines of complainants to interstate destinations have been since October, 1918, and still are, unjust, unreasonable, and unduly prejudicial, in violation of section 1 and 3 of the interstate commerce act. We are asked to prescribe for the future just and reasonable rules, regulations, and practices with respect to the distribution of coal cars at mines served by two or more carriers, hereinafter termed joint mines.

An intervening petition in support of complainants' contentions was filed at the hearing in Nos. 12083 and 12084 by 14 coal companies operating 23 joint mines in the New River district. These interveners will hereinafter be treated as complainants. Intervening petitions in opposition to complainants' contentions were filed on behalf of the Northern West Virginia Coal Operators' Association in Nos. 12081 and 12082 and on behalf of 14 operators of local mines in the New River district in Nos. 12083 and 12084. The Fifth and Ninth Districts Coal Bureau and the Illinois Coal Traffic Bureau intervened in all four cases, but the latter took a neutral position No evidence was offered by these interveners except the Northern West Virginia Coal Operators' Association, although the Fifth and Ninth Districts Coal Bureau filed a brief.

43 In In re Irregularities in Mine Ratings (25 I. C. C. 286), hereinafter referred to as the Illinois case, we laid down the following rule to govern distribution, during the periods of car shortage, of coal cars to joint mines served by the Illinois Central and other carriers:

We think that on days for which it orders no cars from any other carrier, the junction-point mine should be given its pro rata of cars by the Illinois Central on the basis of its full rating; that on a day for which it orders cars from one other road, its rating on the Illinois Central for that day should be 75 per cent of its full rating, and that on a day for which it orders cars from two other roads, its rating on the Illinois Central for that day should be 50 per cent of its full rating.

This rule, however, was not followed by the defendants herein. The Baltimore & Ohio, Chesapeake & Ohio, and Monongahela treated the joint mines the same as local mines in the distribution of cars. They had no information of the number of cars ordered from the

other carrier. So far as they were concerned the joint-mine operator could order and secure 100 per cent car supply from each road. The practice of the Virginian was unique. Its car supply practically met the demands of the shippers along its line. It therefore set aside a certain number of cars to take care of its fuel needs and of mines under development and pro rated the remainder of its equipment in proportion to the shipments via the Virginian for the preceding 12 months. If one shipper, for example, were issued 480 cars in the pool, it was embargoed, after its loading exceeded the number of cars set aside for the mine or mines until the cars were made empty, and was penalized four days to permit the empties to return from the destination to the mines. This practice was followed at both local and joint mines.

Effective October 10, 1918, car service Circular CS–31 became effective, and under rule 2 prescribed the following method for ordering cars for joint mines:

Copies of orders for cars from a mine that is joint with any other carriers (steam, electric or water) shall be filed with the desig-
44 nated representative of each such carrier. Such combined requests must not exceed the gross daily rating of the mine.

After the signing of the armistice, and until the summer of 1919, there was a lessened demand for coal, and the resultant surplus of coal cars enabled carriers generally to accord all mines a full car supply. The limitations of the rule were not therefore felt until a car shortage developed in the summer of 1919. From that time until approximately December, 1920, the available supply of cars for coal loading throughout the country was insufficient to meet the demands.

At the time Circular CS–31 became effective the Chesapeake & Ohio and Virginian joint mines were zoned, and the car service rules affecting joint mines were not in force. Because of that fact mines zoned to the Virginian had to depend upon the Virginian and mines zoned to the Chesapeake & Ohio had to depend upon the Chesapeake & Ohio, exclusively, for cars.

On March 2, 1920, we issued a notice to carriers and shippers in which we recommended that until experience and careful study demonstrated that other rules would be more effective and beneficial especially during the remainder of the early spring, the uniform rules as contained in the Railroad Administration's car service Circular CS–31, revised, be continued in effect. By further notice to carriers and shippers dated April 15, 1920, our notice of March 2 and our recommendation therein was modified as to rule 8 of the circular. Rule 2 of car service Circular 31 became rule 4 in the revised circular, but contained no change. The complaints are directed against the last sentence of rule 4.

On July 8, 1920, the Chesapeake & Ohio and Virginian, on request of complainants, filed with us a petition asking that they be permitted to follow the rule laid down in the Illinois case. We declined informally to take that action. These complaints followed.

There are two joint mines on the White Oak branch of the Chesapeake & Ohio extending from Glen Jean to Carlisle. This
45 branch was formerly the White Oak Railway. Later the Chesapeake & Ohio granted to the White Oak Railway trackage rights over this branch to enable it to reach these two mines. In the meantime the White Oak Railway had built a new line from Carlisle to Lochgelly and from Duncan's Crossing, a point intermediate to Lochgelly, to Bishop, where it connected with the Virginian Railway. There are three mines located on this new line. In 1912 the Chesapeake & Ohio and the Virginian jointly leased the White Oak and the Piney River & Paint Creek Railroad. In 1917 the new line of the White Oak, above referred to, was purchased by the Virginian, and it is now known as its Wolf Creek branch. In the same year the Chesapeake & Ohio purchased the Piney River & Paint Creek, now known as the Piney River & Paint Creek branch, which connected with the Piney Creek branch of the Chesapeake & Ohio at Beckley Junction. Three and two mines are located on these branches, respectively. The Chesapeake & Ohio also purchased the Price Hill division of the White Oak Railway extending from Price Hill Junction to Price Hill, a distance of about 2.5 miles. This division had no connection with the Wolf Creek branch of the Virginian. Under the terms of a trackage agreement dated November 1, 1917, the Chesapeake & Ohio granted certain trackage rights to the Virginian and the Virginian granted certain trackage rights to the Chesapeake & Ohio over the newly acquired lines, as well as over their own lines, to make the necessary connection with their own operation. This trackage agreement is substantially the same as the trackage agreement in effect between the Chesapeake & Ohio and the Virginian from 1912 to 1917, under which the White Oak and the Piney River & Paint Creek were operated under lease jointly by the Chesapeake & Ohio and the Virginian.

The agreement of sale, and trackage agreement, provided that each carrier should have equal access to and from all mine operations then or thereafter located on the tracks mentioned. For pur-
poses of economy the Chesapeake & Ohio arranged to serve cer-
46 tain of the mines located on its rails as agent for the Virginian, and the Virginian in turn agreed to place Chesapeake & Ohio cars at mines located on its rails. Each road retained the right to perform the service for itself in case complaint was made of the service performed by the order. Each of the mines is shown as being located on each of these roads and the rates are published as applicable by each. The White Oak and Piney River & Paint Creek railways were constructed and owned by the New River Company. One additional mine covered by the complaint is served jointly by the Chesapeake & Ohio and the Kanawha, Glen Jean & Eastern. This latter line is not a defendant and no further consideration will be given to that mine.

The complainants contend that they have the right to order 100 per cent of their gross daily ratings from each of their connections in

times of car shortage and that each road is obligated to serve each of the mines tributary to its rails without discrimination.

It is testified that in acquiring their properties the operators considered it to be essential to successful operation that they have connections with two trunk lines. With this object in view the New River Company built the railways mentioned. The operators of the Parker Run mine commenced operations with the assurance of a car supply from each railroad, one of which was then in contemplation. It is testified that the transportation facilities were a prime reason for the organization of the company. One of the complainants had the option of putting in a drift operation local to the Virginian or a shaft operation entailing a three-mile extension from the Virginian which would permit of a connection with the Chesapeake & Ohio. It elected to pursue the latter course, and built at its own expense one half of the extension and the Virginian built the other half in order that service might be obtained from both roads.

The efforts of the local-mine operators were directed mainly to showing that a greater percentage of cars were left over at joint mines than at local mines; that the capacity of the present
47 sidetracks at joint mines would be insufficient to take care of the equipment if they were permitted to order their gross rating from each carrier; and the alleged advantage which the joint mine has by reason of being able to ship over the road having the greater car supply.

The Baltimore & Ohio contends that the rule in issue is fair and does not operate to the disadvantage of the joint mine, which has the advantage of being able to order cars from the line having the greater car supply. It is interested only to the extent of having rules which will operate equitably as between all shippers of coal situated on its rails, and which will assure the most expeditious handling of equipment.

The interveners operating local mines in the Fairmont and New River districts proceed on the theory that what complainants desire is to order cars on basis of 200 per cent of their maximum capacity to produce. This, however, is not the fact. Complainants' request, while theoretically based on the right to order 100 per cent from each carrier, is subject to restriction to its total mine rating.

The complainants further contend that the operation of the rule referred to amounts to a denial of car service to the complainants, and that the rule was issued solely as a war measure. This contention is not supported by the record. On the contrary, it appears that at the time of the adoption of Circular CS–31 no consideration was given to the length of time the rules were to be made operative, although the fact that the roads were being operated as a unit under Federal control was a prime reason for the adoption.

The practical operation of the rule complained of is as follows: Mine A is a joint mine served by the Chesapeake & Ohio and Virginian; mine B is local to the Chesapeake & Ohio, while mine C is local to the Virginian. Each has a daily rating of 20 cars. On a cer-

tain day the Virginian has a 70 per cent car supply, and the Chesapeake & Ohio a 50 per cent car supply. Mine A divides its order between the Chesapeake & Ohio and the Virginian; that is, it orders 10 cars from each carrier. Local mines B and C each orders 20 cars. As the car supply of the Chesapeake & Ohio is 50 per cent it would furnish mine A with 5 cars while the Virginian, with a 70 per cent car supply, would furnish 7 cars, or a total of 12 cars from both roads. Mine B would receive 10 cars from the Chesapeake & Ohio, and mine C 14 cars from the Virginian.

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The joint mines in the New River district, during the month of August, 1920, under the operation of the rule here complained of, received 1,392.6 cars from the Chesapeake & Ohio and 1,881.8 cars from the Virginian, or 167.3 cars more from the Chesapeake & Ohio and 48.2 cars less from the Virginian than they were entitled to. If they had been accorded a similar car supply as local mines with like ratings located on defendants' lines they would have received 2,104.9 cars from the Chesapeake & Ohio and 3,471.1 cars from the Virginian. These joint mines received 183.6 cars less on the Chesapeake & Ohio and 714.6 cars less on the Virginian than they would have been entitled to during the said month under the rule approved by us in the Illinois case.

During 1920 cars left over at local mines on the Chesapeake & Ohio averaged 8.2 per cent of cars placed, while those left over at joint mines in the New River district averaged 11.4 per cent. The left-overs on the Virginian at joint mines were slightly in excess of the left-overs at local mines, due in part to the physical conditions on what was formerly the White Oak Railway. The Virginian operates over that line only in the daytime, and efforts are made to get sufficient cars to the mines the night preceding for the commencement of operations the following day. If cars are placed too late in the afternoon to be loaded they are reported as being left over. A witness for the Chesapeake & Ohio testified that the question of left-over cars was largely a matter of policing, and that if proper information were given to each railroad regarding the order and supply of cars there would be no occasion for cars being left over at joint mines to a greater extent than at local mines. This witness testified that rule 4 is defective in that it does not require that all lines serving joint mines be supplied with such information as would make over-ordering impracticable, and thus make full utilization of the empty equipment available from day to day.

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The complainants concede that the railroads should exchange such information as will enable them to police left-over cars, and that very few joint mines have trackage facilities greater than their capacity to ship. No difference appears in the record in the latter respect between joint and local mines.

The interveners have filed in evidence a statement of competitive car supply on basis of equivalent number of full days worked by joint mines as against local mines in the New River district by months, for the period from March 1 to December 31, 1920, both

dates inclusive. This statement shows that the joint mines worked 157.13 days and the local mines 123.78 days. An aggregate rating of the mines by each carrier is shown, together with the total cars supplied by each. The total cars supplied by both roads are divided by the average aggregate rating of both roads, and the result is shown as the equivalent of the number of full days worked. This statement is subject to the criticism that it takes the aggregate mine ratings rather than the number of cars ordered.

While it is true that the joint mine has an advantage by reason of its location on two railroads because of the additional markets which it can reach, it is likewise true that the joint mine is not always in a position to avail itself of its alleged advantage because of the practice in the coal business to make contracts for yearly periods beginning with April 1. Neither is it possible at all times for the joint mines to order all their cars from the carrier having the greater car supply, as its contracts may also require shipments to be made by the line having the lesser car supply in order to meet its current obligations. It frequently happens that the joint mine receives a less car supply than the local mine situated on the road having the greater car supply

In the Illinois case we said:

50 "Owners of junction-point mines have expended large sums in order to secure connections with more than one road. The junction-point mine has available a more extensive and more varied market for its coal. It may at times be able to dispose of its products upon the second line of railroad, while the mine local to the first road is unable to market its output. In case of car shortage the junction-point mine is able to select the outlet which affords the best and most liberal means of transportation. These are important advantages to which the junction-point mine is entitled and in the reasonable enjoyment of which it should be protected.

"* * * It would be unjustly discrimnatory against the junction-point mine not to give reasonable recognition to its natural advantages of location."

We also stated that it was necessary, in order to avoid unjust discrimination in favor of the joint mine as compared with the local mine, to somewhat limit its power to assert its capacity against two or more carriers at the same time.

Following the views expressed in that case, and upon this record, we find that rule 4 of Circular CS–31, revised, is unreasonable and unduly prejudicial to joint mines and unduly preferential of local mines, to the extent that it limits the aggregate orders of the joint mine to 100 per cent of its rating from both roads; and that for the future during periods of car shortage defendants should distribute cars to the joint mines on their lines here considered on the basis outlined in the Illinois case, namely, on days when the joint mine orders cars from only one carrier it shall have cars based upon its full rat-

ing from that carrier, and on days on which it orders cars from both carriers its rating on each of such carriers shall be 75 per cent of its full rating, subject to the limitation that it shall on no day be supplied with cars in excess of its maximum rating. Information should be exchanged between carriers showing the left-over cars in order to prevent some of the abuses which have heretofore been pointed out.

Under paragraph 13 of section 1 of the interstate commerce act we are authorized by general special orders to require all the car-
51 riers by railroad subject to the act to file with us from time to time their rules and regulations with respect to car service, and we may, in our discretion, direct that such rules and regulations be incorporated in the schedules showing rates, fares, and charges for transportation and be subject to any or all of the provisions of the act relating thereto.

We have not required that car service rules be filed as tariff schedules. We will not in this proceeding direct that the rules which we herein find to be reasonable be so filed. We shall expect, however, that defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies thereof with us.

By the commission, division 5.

(SEAL.) GEORGE B. MCGINTY, *Secretary.*

62 I. C. C.

(Washington: Government Printing Office: 1921.)

A true copy.

GEORGE B. MCGINTY, *Secy.*

52 *Appendix C to amended bill.*

Interstate Commerce Commission.

No. 12362.*

BELL & ZOLLER COAL COMPANY ET AL. VS. BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY ET AL.

Submitted March 16, 1922. Decided December 11, 1922.

Defendants' rules governing the distribution of cars to mines of complainants for coal loading found not unreasonable or unduly prejudicial. Decision in In re Irregularities in Mine Ratings (25 I. C. C., 286) distinguished and limited. Fairmont & Cleveland Coal Co. vs. B. & O. R. R. Co. (62 I. C. C., 269) reversed. Complaints dismissed.

Clarence B. Cardy, Cooper, Royse, Bogart & Gambill, Paul N. Bogart, and Samuel D. Royse for complainants in Nos. 12362 and 12399.

* This report also embraces No. 12399, Vigo Mining Company et al. vs. Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company et al.; No. 12081, Fairmont & Cleveland Coal Company vs. Baltimore & Ohio Railroad Company; No. 12082, Fairmont & Cleveland Coal Company vs. Monongahela Railway Company; No. 12083, New River Company et al. vs. Virginian Railway Company; and No. 12084, New River Company et al. vs. Chesapeake & Ohio Railway Company upon reargument.

James W. Carmalt for complainants in Nos. 12081, 12082, 12083, and 12084.

O. W. Dynes for Chicago, Milwaukee & St. Paul Railway
53 Company; A. P. Humburg for Illinois Central Railroad Company; Robert H. Widdicombe for Chicago & North Western Railway Company; Kenneth F. Burgess for Chicago, Burlington & Quincy Railroad Company; L. P. Day for Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; and W. S. Bronson for Chesapeake & Ohio Railroad Company.

P. H. Greenlaw for Fifth and Ninth Districts Coal Bureau.

Eugene McAuliffe for Union Colliery Company; John M. Sternhagen for Clinton Coal Company, W. S. Bogle Company, and S. B. Mines Company.

Eugene McAuliffe, F. X. Sextro, James Forrester, and George V. Penwell for committee of local mine operators of Illinois; George S. Brackett for Northern West Virginia Coal Operators' Association; G. H. Caperton for committee of local mine operators in New River district of West Virginia; and George T. Bell for interveners.

Report of the Commission.

By the Commission:

These cases involve similar issues and will be disposed of in one report.

In Fairmont & Cleveland Coal Co. vs. B. & O. R. R. Co. (62 I. C. C., 269), hereinafter termed the Fairmont cases, we had before us rule 4 of car service Circular CS-31, revised We found that rule to be unreasonable and unduly prejudicial to joint mines and unduly preferential of local mines, to the extent that it limited the aggregate orders for cars of the joint mine to 100 per cent of its gross daily rating. We also found that for the future, during periods of car shortage, defendants should distribute cars to the joint mines on their lines on the basis outlined in In re Irregularities in Mine Ratings, (25 I. C. C., 286), hereinafter called the Illinois case. In effect, that rule provided that on days when the joint mine orders cars from only one carrier it shall be furnished cars based on its full rating from that carrier, and on days on which it orders cars from both carriers its rating on each of such carriers for the purpose of ordering cars
54 should be 75 per cent of its full rating, subject to the limitation that on no day shall it be furnished with cars in excess of its maximum rating. No order was entered. Upon petition of intervening local mine operators, we reopened those cases for further argument, and consolidated them with Nos. 12362 and 12399. These cases were submitted together.

The complainants in the Fairmont cases operate joint mines in West Virginia, one of which, located in the Fairmont district, is served jointly by the Baltimore & Ohio and the Monongahela, and the others, located in the New River district, are served jointly by the Chesapeake & Ohio and the Virginian. Complainants in No. 12362

operate 61 joint and 18 local mines in Illinois, while complainants in No. 12399 operate 6 joint mines in Indiana. Some of the mines in the latter two cases are served by more than two carriers.

All tne complaints substantially allege that defendants' rules, regulations, and practices governing the distribution of coal cars to complainants' mines served jointly by two or more railroads have resulted in the distribution during car-shortage periods since October, 1918, of a smaller share of empty coal cars to complainants' mines than is distributed to and received by mines in the same territory which are served by one defendant carrier only; and have been and are unreasonable, unduly preferential of complainants' competitors, and unduly prejudicial to complainants, in violation of sections 1 and 3 of the interstate commerce act. We are asked to prescribe just, reasonable, and nondiscriminatory rules, regulations, and practices to govern the distribution of coal cars to mines served by more than one carrier.

Various operators and committees have intervened in opposition to the complaints in Nos. 12362 and 12399. The Union Colliery Company was the only intervener in whose behalf evidence was offered. Various intervening petitions were filed in Nos. 12081, 12082, 12083, and 12084, as appears in our report in the Fairmont cases, at page 270.

The defendants assume a neutral position and are merely
55 concerned with the establishment of a rule that will be fair and reasonable to all parties concerned, and which will be workable.

Throughout this report the term "local mine" will be used to designate a mine situated on and served by only one railroad. The term "joint mine" will denote a mine served by 2 or more railroads with their own rails or a mine situated on 1 railroad, but actually served by 1 or more additional carriers under trackage agreements of switch-absorption arrangements. Complainants' mines which are described of record, are embraced within the term "joint mine."

For some years prior to 1912 there was constant controversy between the Illinois Central Railroad and the operators of coal mines located upon its rails relative to the mine ratings, which form the basis of car distribution in times of car shortage, and the rules governing such distribution of cars. The matter was finally submitted to us for determination, upon the record in a proceeding in which no other carrier was a party. In the Illinois case, decided December 3, 1912, we alluded to the rules of the different carriers, discussed the contentions of the conflicting interests, and laid down certain rules to be observed in the rating of mines under the circumstances of that case, and the following rule to govern the distribution of coal cars by the Illinois Central, during periods of car shortage, to mines served jointly by it and other carriers:

"We think that on days for which it orders no cars from any other carrier, the junction-point mine (joint mine) should be given its pro rata of cars by the Illinois Central on the basis of its full rating; that on a day for which it orders cars from one other road, its rat-

ing on the Illinois Central for that day should be 75 per cent of its full rating; and that on a day for which it orders cars from two other roads, its rating on the Illinois Central for that day should be 50 per cent of its full rating."

These rules were thereafter followed by the Illinois Central.
56 Certain other carriers in that territory, including the Chicago & Eastern Illinois, hereinafter called the Eastern Illinois, Missouri Pacific, Chicago, Indianapolis & Louisville, and the Chicago, Terre Haute & Southeastern, voluntarily applied the same rule. The method of rating the mines on the Missouri Pacific was somewhat different. The Chicago, Burlington & Quincy hereinafter referred to as the Burlington, treated all mines on its line on an equality so far as distribution was concerned. Its rules provided for rating the mines on the basis of the tonnage shipped over its road for 10 consecutive days when the mine operated full time and there was a full car supply, plus 20 per cent for development and increase. Every mine, whether local or joint, was entitled to order cars from it based on 100 per cent of its rating as thus determined. The witness produced by this carrier was unable to state in what manner cars were distributed by other carriers to mines served jointly by the Burlington and such other carriers. The methods of car distribution of the other carriers against which the complaints in Nos. 12362 and 12399 are directed are not shown of record, but apparently they were not uniform. Those adopted by the defendants in the Fairmont cases are set forth in our report in those cases.

During the World War agencies were created by the Government to deal with problems of fuel supply. In December, 1917, the principal railroads were taken under Federal control, and thereafter, until March 1, 1920, were operated as a unified and coordinated national system. In April, 1918, the United States Fuel Administration adopted a zoning system, the purpose of which was to minimize haulage, prevent cross hauls, control the distribution of coal to consuming territory, and to increase the supply of cars for coal loading. This system naturally affected and materially changed the distribution of coal so far as markets were concerned. The price of coal was fixed by the fuel administrator.

On October 10, 1918, in Circular CS–31, the United States Railroad Administration promulgated a uniform code of rules governing the rating of coal mines (other than anthracite), loading coal at mine tipples and the distribution of cars to such mines, to
57 supersede all then existing rules, which were far from uniform. Rule 2 of this circular provided that:

"Copies of orders for cars from a mine that is joint with any other carrier (steam, electric or water) shall be filed with the designated representative of each such carrier. Such combined requisitions must not exceed the gross rating of the mine."

This circular was reissued as Circular CS–31, revised, effective January 10, 1920. Rule 2 became rule 4 of the revised circular, but contained no change. This rule, which prohibits the operator from

ordering cars in excess of the gross daily rating of the mines, was a radical departure from the rule prescribed for the Illinois Central in the Illinois case. It was apparently accepted by the operators as a war measure, and because the roads were being operated as a unit under Federal control. Until September, 1919, when a car shortage developed, the mines had all the cars and business that they could take care of, and the effects of rule 2, later rule 4, were not fully apparent until that time. From January to November, 1920, the carriers were unable to meet the demand made upon them for empty coal cars.

Federal control of the railroads terminated March 1, 1920. The transportation act, 1920, approved February 28, 1920, brought paragraph (12) into section 1 of the interstate commerce act, in part as follows:

"It shall be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine."

58 On March 2, 1920, in a notice to carriers and shippers we recommended that until experience and further study demonstrated that other rules would be more effective and beneficial, the uniform rules prescribed in car service Circular CS–31, revised, be continued in effect. This notice was supplemented by a further notice to carriers and shippers dated April 15, 1920, modifying the previous recommendation in certain respects not here material.

In June, 1920, owing to the peculiar conditions existing in Indiana, the carriers in that State began to distribute cars under what is known as the "round robin rule." This contemplated the running of certain mines full time on days when there was a car supply sufficient to give but a part of the mines full running time, and shutting down others, equalizing the time between all the various mines in the current or succeeding months. This practice was agreed to by the operators.

The complainants herein are directed against the last sentence of rule 4 of Circular CS–31, revised, which limits the joint-mine orders for cars from all the carriers to the gross daily rating of the mine. The whole subject of the ratings of coal mines, other than anthracite, and the distribution of cars between them in times of short car supply, is pending before us in another proceeding. While there may be local variations in method of application, the general basis of ratings may be stated in substance.

The rating of a local mine is determined by taking the total tonnage shipped by the mine during the preceding month over the carrier serving the mine dividing it by the number of hours worked

in producing it, and multiplying the quotient by the number of hours in the recognized workday (not more than 10 hours) of the individual mine. A rating so determined is called the daily rating, as distinguished from the gross daily rating which applies to a joint mine, and which is determined in a similar manner, but by taking the total tonnage shipped over the lines of all the carriers serving the mine.

Complainants contend that a joint mine is entitled to the same pro rata distribution of cars from each carrier as the local
59 mines on each of the carriers serving it. They claim that each carrier is under a legal obligation to give equal service to all mines located upon its lines. They do not demand the full measure of that which they consider as their due, the legal right to order cars from each carrier based upon the gross daily rating of the mine, but ask that we restore the rule prescribed for the Illinois Central in the Illinois case, with the limitation that in no case should cars be furnished to such joint mine in excess of its gross daily rating.

Certain joint mines in Illinois and Indiana have expended large sums to secure connections with more than one road. This is not true as to all of the joint mines. The evidence seems to establish the fact that it was the desire of the carrier to secure coal traffic particularly in the southern Illinois coal field, which led to arrangements being made by them for ingress to large mines, either by building into such mines or by means of trackage agreements or switching-absorption arrangements. In instances of this kind it not infrequently happens that the joint mine builds and maintains its own switch tracks and maintains its own locomotives to perform the necessary switching service. The location of the joint mines in the New River and Fairmont districts, and the manner in which service is accorded those mines, are fully set forth in our report in the Fairmont cases, and need not be repeated here.

It is admitted by all that the joint mine enjoys advantages not possessed by the local mine, and has the right to so place its orders as to avoid, if it can, embargoes and congestion of traffic on particular roads. It has available a more extensive and more varied market for its coal. It may at times be able to dispose of its product upon the second line of railroad, while the mine local to the first road is unable to market its output. In case of car shortage the joint mine is able to select the outlet which affords the best and most liberal means of transportation. These are important advantages to which the joint mine is entitled and in the reasonable enjoyment of which it should be protected.

Complainants urge that under rule 4, here attacked, the natural advantages of the joint mine are not recognized in the distri-
60 bution of cars. They say that the rule does not give the joint mine any advantages in this respect when, due to the development of its markets and the contracts which it has assumed, it must, of necessity, ship over lines other than the one having the greater

car supply. Under the present rules a joint mine can receive as great a number of cars as the local mine located on the line having the greater car supply by confining its orders exclusively to that line. Complainants contend that rule 4 has had the effect, therefore, of limiting their distribution to markets on one railroad only. With this contention we are unable fully to agree. Whenever the joint mine orders cars from the different carriers serving it, it is doubtless due to other compensating advantages which outweigh those of a temporary greater car supply, and such election is the voluntary choice of the shipper.

The operation of rule 4 is shown by the following example: A joint mine with a gross daily rating of 50 cars located on carriers A and B orders all its cars from carrier A, which has an 80 per cent car supply. The joint mine will receive the same number of cars as a local mine with a daily rating of 50 cars on carrier A. However, if carrier B has a 50 per cent car supply and the joint mine divides its order equally between the two carriers, it will receive 80 per cent of 25 cars, or 20 cars, from carrier A, and 50 per cent of 25 cars, or 12.5 cars, from carrier B, a total of 32.5 cars compared with 40 cars received by the local mine on carrier A. Should the joint mine order more than half its cars from the carrier with the greater car supply this will change the figures somewhat, but in no instance will the joint mine receive as many cars as the local mine served by carrier A if the orders are divided. The complainants concede that the joint mine will, in the aggregate, receive more cars than the local mine located on the carrier with the lesser car supply, and it possibly may receive more cars on the average than the local mines of similar rating on both carriers.

In Ridge Coal Mining Co. vs. M. P. R. R. Co. (62 I. C. C. 259, 262), we said:

"* * * the actual or constructive location of the com-
61 peting mines upon two or more lines of railroad substantially differentiates their situation from that of the complainant's local mine; and that the preference and advantage over the complainant which such competing mines enjoy by reason of service by two or more lines is not undue."

During September, 1919, the daily ratings of joint and local mines on the Illinois Central (St. Louis division) were 1,845 and 801 cars, respectively. On this basis, under Circular CS-31, revised, the joint mines would have been entitled to 69.7 per cent of the 23,042 cars delivered by the Illinois Central to all mines on its St. Louis division during that month, or 16,060 cars, if they had confined all their orders to that railroad. By dividing their orders for cars they received 4,068 cars less than they otherwise would have received. Under the rule of the Illinois case the daily rating of these joint mines on the Illinois Central during the same month would have been 1,106 cars, or 57.9 per cent of the total ratings of all mines, provided the orders for cars were divided among all the carriers serving the joint mines. On this basis the joint mines would have been entitled to 13,341 cars,

or 1,349 cars more than they actually received. During October, 1919, using the same basis, the joint mines would have received 6,532, or 2,742 cars, respectively, less than they actually did receive, while during August, 1920, the deficiencies would have been 6,968, or 4,272 cars, respectively. Joint mines on the Missouri Pacific and Eastern Illinois would likewise have received substantially fewer cars. While the Burlington's car supply during the periods covered by the complaint in No. 12362 was better than that of other roads, complaints for comparative purposes used the Illinois Central figures for the reason that the Burlington did not operate under the rule prescribed in the Illinois case. Complainants in Nos. 12362 and 12399 have submitted no statement as to the relative car supply furnished joint mines and local mines during any period.

Interveners have introduced as exhibits statements which compare the car supply at joint and local mines in southern Illinois
62 during certain months. In September, 1919, the local mines in Franklin, Williamson, Perry, and Gallatin Counties were furnished cars on an average equivalent to 73.3 per cent of their mine ratings, while the joint mines in the same counties during the same month were furnished cars on the average equivalent to 84.6 per cent of their mine ratings. From this interveners argue that since the joint mines already have an advantage, it can not be found that they are prejudiced under the application of rule 4. This conclusion does not follow. The exhibit shows that the Burlington, which during this month had the best car supply, served only 6 of the 30 local mines, but served 23 of the 35 joint mines, and that the joint mines in each case ordered by far the greater portion of their cars from that road. It follows that the joint mines would secure a greater percentage of cars on the average than the local mines, the great majority of which are on the roads with a lesser car supply. If the joint mines had confined their entire order to the road with the best car supply the percentage in favor of the joint mine would have been somewhat increased.

During 1920 cars left over in the New River district at local mines on the Chesapeake & Ohio averaged 8.2 per cent of cars placed, while those left over at joint mines averaged 11.4 per cent of the number placed. On the Virginian the cars left over at joint mines were slightly in excess of those left over at local mines, due in part to the physical and operating conditions on what was formerly the White Oak Railway. A witness for the Chesapeake & Ohio testified that the question of left-over cars was largely a matter of policing, and that if proper information were given to each railroad regarding the order and supply of cars there would be no occasion for cars being left over at joint mines to a greater extent than at local mines. Rule 4, in the opinion of the witness, does not require that all lines serving joint mines be supplied with such information as would make overordering impracticable and thus provide a full utilization of the empty equipment available from day to day.

The evidence indicates that in times of car shortage mine ratings, both local and joint, become inflated an average of 33⅓ per cent.

The mine which has the means of more consistently securing
63 as much as or more than 75 per cent of its daily rating will have more cars left over than another mine which does not possess such means. Therefore to permit of a further inflation of 50 per cent for the purpose of ordering cars would result in a waste of equipment unless some means are devised to prevent overrating of the mines. Witnesses for the joint mines stated that if the carriers would advise the operators each day as to the probable available car supply no more cars would be ordered than could be loaded in one day. Information of this kind should be conveyed to the operators of both joint and local mines.

Interveners contend that unless an order for cars for the transportation of coal be accompanied by a bona fide tender or setting aside of the coal to be transported, it is not a reasonable request for transportation within the meaning of paragraph (4) of section 1 of the interstate commerce act. For example, if the gross daily rating of a mine is 200 tons, interveners contend that it would be unreasonable to say that the mine, for the purpose of ordering cars, should be in a position of tendering 300 tons to the carriers serving it and to secure its pro rata share of cars on that basis.

Interveners further contend that the first sentence of paragraph (12) of section 1 requires every carrier, during periods of car surplus, to make a just and reasonable distribution of cars among the mines served by it or customarily dependent upon it for car supply, and leaves the question of what is a just and reasonable distribution of cars to the discretion of the carrier or to us upon complaint and after full hearing, while the second sentence of paragraph (12) specifies the particular manner in which the cars are to be distributed during periods of car shortage and leaves nothing regarding the distribution either to the discretion of the carrier or to us. This sentence does not use the term "distribution," but interveners argue that to maintain and apply just and reasonable ratings and to count each and every car furnished to or used by any such mine for transportation of coal against the mine is a mandatory rule of law requiring an exact pro rata distribution of cars in accordance with the prescribed ratings, whether the mine be served by one or

more carriers. In view of our conclusions herein, and because
64 the interpretation of paragraph (12) is before us in another proceeding now pending, we will not pass upon that contention here.

Upon the present record and in the light of instant conditions we are not disposed to extend the principle laid down in the Illinois case, which was intended as a limitation upon the practice of the respondent in that proceeding. Ten years have elapsed since our decision in that case, and we now have a considerable experience with the results of the practice inaugurated by the carriers following our determination, as well as a broader record. We have indi-

cated in proceedings of this character that the principle of stare decisis has no application, and that our determinations as to what will for the future be just and reasonable must meet changed conditions and wider knowledge, as developed by the passage of time. (Hillside Coal & Coke Co. vs. P. R. C. Co., 19 I. C. C. 356, 361.) Indeed, in passing upon the mine-rating feature of the Illinois case, we indicated in the report at page 295, that we did so only upon the facts and under the conditions there presented, and that our determination in approving the basis presented was not to be understood as indicating approval of its adoption in places where it would not suitably and properly meet the conditions, or where it would be objectionable to the great majority of those affected thereby. In important particulars the present record presents new aspects to us. There have been important developments in the coal industry, not then in contemplation. The superior advantages of the joint mine over its local competitor, in part flowing from the decision in the Illinois case, have resulted in a proportionately greater development of the industry at points where mines may be served by two or more carriers rather than by but one. A duplication of trackage and of trackage rights has followed in numerous instances. The practice indicated in the Illinois case seems, in certain instances, to result in a waste of car-days which in view of the effects of recent and present car shortages should be avoided. There has been extreme dissatisfaction in the ranks of mine labor, accentuated, in any event, by inequalities in opportunities for working time and wages. The results of such disturbed labor conditions have been harmful to the carriers and to shippers. Whatever tends to
65 inflate the nominal mine ratings beyond the amount which can normally be produced and shipped is distinctly counter to the public interest. We had before us in the Illinois case other objections, not then considered determinative, but which we may fairly consider as still existent.

The present facts considered, we do not conclude upon these records that the rule attacked, rule 4 of Circular CS–31, revised, is in principle unreasonable or unduly prejudicial. Our former conclusions in the Fairmont case, based upon a mistaken adherence to and extension of the decision in the Illinois case, are reversed. The present decision of the course without prejudice to such determination of the questions before us in the general proceeding indicated as involving the mine rating and car-distribution rules as the record may there require. The complaints herein will be dismissed, and we will enter an order to that effect.

Potter, Commissioner, dissenting:

I favor the application of the rule of the Illinois case. To do otherwise is in my judgement to deprive of valuable advantage of location and destroy absolute right under the law. It seems to me the majority report tends to make law rather than apply and enforce it. I think a joint mine has the right to be regarded by each road

as though that road were the only road serving it. It loses no right from one when another reaches it. It should receive pro rated equipment from each road based on the traffic which it tenders to that road in proportion to the traffic tendered by other mines. The volume to be considered as its tender to a particular road is its rated output less the tonnage to be shipped by other lines. The rule of the Illinois case in application recognizes a mine's rights and affords method to work them out with substantial justice in a practical manner. If opportunity to ship over more than one road gives a joint mine an advantage in being able to furnish to labor more nearly continuous employment, that advantage belongs to the mine because of the superior transportation service available to it. We may not restrict the use of transportation facilities in order to equalize mine
66 operation. To do so would be to require discrimination in the use of equipment—not remove it. If a local mine is at a disadvantage it is not because of a transportation problem with which we may deal but because of a labor supply problem which is not for us. It is by no means certain that the application of the rule of the Illinois case affects labor injuriously or tends to disturb the adjustment.

67 *Order.*

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 11th day of December, A. D. 1922.

No. 12362.

Bell & Zoller Coal Company et al. v. The Baltimore & Ohio Southwestern Railroad Company et al.

No. 12399.

Vigo Mining Company et al. v. The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company et al.

No. 12081.

Fairmont & Cleveland Coal Company v. The Baltimore & Ohio Railroad Company.

No. 12082.

Fairmont & Cleveland Coal Company v. The Monongahela Railway Company.

No. 12083.

New River Company et al. v. The Virginian Railway Company.

No. 12084.

New River Company et al. v. The Chesapeake & Ohio Railway Company.

These cases being at issue upon complaints, answers, and intervening petitions on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the complaints in these proceedings be, and they are hereby, dismissed.

By the commission.

[SEAL.] GEORGE B. MCGINTY, *Secretary.*

68 District Court of the United States for the Southern District of West Virginia.

[Title omitted.]

SUPPLEMENTAL BILL OF COMPLAINT.

That the complainants, the New River Company, White Oak Fuel Company, Stuart Colliery Company, Dunnloop Coal and Coke company, Beckley Coal and Coke Company, Mabscott Coal and Coke Company and Cranberry Fuel Company, filed, on or about January 29, 1923, in this honorable court their original bill of complaint against the Chesapeake and Ohio Railway Company, The Virginian Railway Company, the United States of America and the Interstate Commerce Commission, for the purpose of securing an adjudication and decree that a decision, order and ruling of the Interstate Commerce Commission of December 11, 1922, and a certain rule put into effect in accordance therewith, known as rule 4 of Circular CS-31, revised, were without warrant of law and null and void and that the same be set aside and annulled; also praying for a suspensory order,

69 a temporary injunction and a permanent injunction restraining and enjoining the defendants from restricting in accordance with said decision, ruling and order and said rule 4, the transportation service in interstate commerce of the defendant carriers to the complainants, and for other relief, all as set forth in said bill of complaint.

That in Article XVI of said bill your complainants alleged that the Interstate Commerce Commission had failed to take any action on a petition of the complainants filed with the Interstate Commerce Commission to reopen the proceedings in which said decision was rendered and said rule and order issued, and that said decision, ruling and order issued, and that said decision, ruling and order and said rule 4 continued to be in full force and unmodified.

That the complainants hereby further show, by way of supplement:

That on February 5, 1923, since the filing of said original bill, the Interstate Commerce Commission entered an order denying said petition to reopen said proceedings.

THE NEW RIVER COMPANY,
WHITE OAK FUEL COMPANY,
STUART COLLIERY COMPANY,
DUNNLOOP COAL & COKE COMPANY,
BECKLEY COAL & COKE COMPANY,
MABSCOTT COAL & COKE COMPANY,
CANBERRY FUEL COMPANY,
By JAMES W. CARMALT,
AUGUST G. GUTHEIM,
ADDISON C. BURNHAM,
Their Attorneys.

[Title omitted.]

70 In United States District Court.

ORDER AND NOTICE OF HEARING.

Bill of complaint in equity in the above entitled proceedings having this day been presented to this court by the complainants by James W. Carmalt, their attorney in said cause, and application for hearing thereon before three judges as provided in 38 Stat. L. 219, having at the same time been made;

And the said bill of complaint and application for hearing upon those prayers of the bill of complaint, asking for temporary restraining orders and interlocutory injunctions having been duly considered;

It is ordered that said bill of complaint be filed in this court;

It is further ordered that hearing upon said application be set at the court rooms of the United States District Court for the District of Virginia, at Richmond, Virginia, at 10 o'clock a. m., Tuesday, February six, 1923;

It is further ordered that copy of this order together with copy of said bill of complaint be served upon each defendant in said cause;

And it is further ordered that service of this order and of said bill of complaint upon said defendants shall constitute the notice of hearing as in said statute provided.

71 In the District Court of the United States for the Southern District of West Virginia.

MOTION OF UNITED STATES TO DISMISS ORIGINAL BILL.

[Title omitted.]

Comes now the United States of America, one of the defendants in the above entitled cause, by its counsel, and moves the court to

dismiss the bill of complaint herein for want of jurisdiction, at complainants' cost, because:

1. The suit is not a suit against the United States to annul and enjoin an order of the Interstate Commerce Commission, pursuant to the Commerce Court act of June 18, 1910 (ch. 309, 36 Stat. 539) and the urgent deficiencies act of October 22, 1913 (ch. 32, 38 Stat. 219-221), but is obviously a suit against certain common carriers to enjoin them from putting into force and effect a certain rule adopted by the carriers.

2. The order entered December 11, 1922, by the Interstate Commerce Commission, which complainants seek to have annulled, enjoined and declared void, is a negative order.

3. The bill of complaint seeks to invoke the jurisdiction and authority of the court in a controversy between complainants and the defendant carriers which has heretofore been submitted to, heard, and determined by the Interstate Commerce Commission, to the end and in the hope that the court will substitute its juris-
72 diction for that of the commission with respect to a matter committed to the exclusive jurisdiction of the said commission.

4. It appears from the bill of complaint (par. xvi) that the matters complained of and against which relief is sought are now pending before the Interstate Commerce Commission upon the application for rehearing filed by complainants and others.

5. The matters complained of and concerning which relief is sought have been submitted to and adjudicated by the Interstate Commerce Commission, which is charged by law with the determination of such matters. The order made by the said commission was made in the exercise of judgment and discretion in a matter within its sole jurisdiction and hence can not be reviewed or controlled by the courts.

Therefore, defendant prays that its motion be sustained.

ELLIOTT NORTHCOTT,
United States Attorney.
H. L. UNDERWOOD,
Attorney.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

In the District Court of the United States for the Southern District of West Virginia.

MOTION OF UNITED STATES TO DISMISS AMENDED BILL, ETC.

[Title omitted.]

Comes now the United States of America, one of the defendants in the above-entitled cause, by its counsel, and, without waiving its motion heretofore filed to dismiss the bill of complaint for
73 want of jurisdiction, but at all times, now and hereafter, standing and relying thereon, moves the court to dismiss the amended

and supplemental bills of complaint herein for want of equity, and because the said bills do not state facts sufficient to entitle the complainant to the relief sought therein, or to any part thereof, or to any relief in equity.

ELLIOTT NORTHCOTT,
United States Attorney.
H. L. UNDERWOOD,
Attorney.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

In the District Court of the United States for the Southern District of West Virginia.

MOTION OF INTERSTATE COMMERCE COMMISSION TO DISMISS ORIGINAL BILL.

[Title omitted.]

Now comes the Interstate Commerce Commission, one of the defendants in the above-entitled suit, hereinafter called the commission, and moves the court to dismiss, as to it, the bill of complaint in said suit upon the grounds that—

1. The bill of complaint does not contain statements or allegations of fact which entitle the complainants or any of them to the relief or any of the relief prayed for by complainants in and by said bill of complaint.

74 2. The commission's order of December 11, 1922, which is included in Appendix C to the bill of complaint, and wherein and whereby the commission denied the relief asked for by complainants in certain proceedings before the commission, mentioned in the bill of complaint, and dismised their complaints, is a negative order within the meaning of the ruling of the Supreme Court of the United States in Proctor & Gamble Company v. United States (225 U. S. 282), and therefore an order over which this court may not properly exercise jurisdiction.

3. The commission's report, included in said Appendix C, which is referred to in the bill of complaint as the commission's "decision and ruling," does not contain any order or requirement, and therefore this court does not possess jurisdiction which enables it to comply with complainants' request to annul and set aside said report.

P. J. FARRELL,
For Interstate Commerce Commission, Defendant.

In the District Court of the United States for the Southern District of West Virginia.

MOTION THAT THE MOTION TO DISMISS THE ORIGINAL BILL BE TAKEN AS APPLYING TO THE BILL AS AMENDED AND SUPPLEMENTED.

[Title omitted.]

Now comes the Interstate Commerce Commission, one of the defendants in the above-entitled cause, and moves this court that

its motion to dismiss the original bill of complaint herein be taken and considered as a motion to dismiss the bill of complaint herein, as finally amended and supplemented.

J. CARTER FORT,
For the Interstate Commerce Commission.

75 In United States District Court.

ORDER SUSPENDING RULING OF INTERSTATE COMMERCE COMMISSION.

(Entered February 8, 1923.)

[Title omitted.]

This cause having come to be heard on the 6th day of February, 1923, on the prayer for a temporary stay or suspension of the operation of the decision, ruling and order of December 11th, 1922, issued by the Interstate Commerce Commission in the cause before said commission, No. 12083, New River Company et al. vs. The Virginian Railway Company, and No. 12084, New River Company et al. vs. The Chesapeake and Ohio Railway Company, and of rule 4 of Circular CS–31 (revised), as referred to and described in the bill of complaint in this cause, and having, after due notice, been heard by three judges, to wit, Hon. C. A. Woods and Hon. Edmund Waddill, jr., circuit judges, and Hon. Geo. W. McClintic, district judge, duly convened for said hearing, all parties defendant being represented at said hearing by their attorneys; said cause having been heard and having been argued by all parties, all after due notice, and evidence having at said hearing been submitted that irreparable damage would result to the complainants unless the operation of said decision, ruling and order and of said rule 4 were stayed and suspended, which said evidence has been transcribed and identified with reference hereto;

76 It is found, ordered, adjudged and decreed, two of said judges concurring herein as follows:

1. It is found that irreparable damage would result to the complainants unless the operation of said decision, ruling and order and of said rule 4 is suspended and stayed; that the nature of said damage is that unless the operation of said ruling, order and rule 4 is stayed and suspended the transportation facilities for the shipment of coal produced by the complainants will be so reduced that it will be impossible for the complainants to fulfill their deliveries on existing contract obligations for the delivery of coal; that the complainants' labor organization, gradually built up through a period of time, will be disrupted and disorganized; that complainants will suffer injury to the good will of their business and loss of present and future business; that the complainants' plant and equipment will become in part idle; that the returns on the lessened amount of coal

which the complainants will be able to ship will be unable adequately to carry the overhead charges of the complainants' plants and of their business, and that the cost of the coal produced by the complainants will be increased to a large amount per ton.

2. It is ordered, adjudged and decreed, that the operation of said decision, ruling and order of December 11, 1922, of the Interstate Commerce Commission and of rule 4 of Circular CS–31 (revised) be stayed and suspended for a period of sixty days from the date of this order, pending the application for an injunction.

This order shall not become effective until the complainants, or some one of them, *or some one for them*, shall enter into a bond, payable to the United States of America, before the clerk of this court, with proper surety to be approved by the judge thereof, in the penalty of $100,000.00, conditioned according to law.

77 It is ordered that the evidence of S. A. Scott, taken before the court and transcribed by a stenographer, be and the same is here filed as part of the record of this cause.

Enter above order.

GEO. W. MCCLINTIC, *D. J.*
EDMUND WADDILL, JR.,
Judge, Circuit Court.

RICHMOND, VA., *February 8, 1923.*

I dissent; see memorandum to be attached.

C. A. WOODS,
Circuit Judge.

78 In United States District Court.

ORDER SETTING APPLICATION FOR INJUNCTION FOR HEARING.

(Entered February 17, 1923.)

[Title omitted.]

This cause coming on this day to be further heard, and it appearing to the court that a temporary restraining order was entered herein on the 8th day of February, 1923, staying for a period of sixty days from said date the operation of a certain decision and ruling and order of December 11th, 1922, of the Interstate Commerce Commission; and it appearing further that the hearing for an injunction as asked for in this cause should be had as speedily as possible; and it appearing that under the law in such case made and provided that it is necessary for the judge of this court to call to his assistance two other judges, and that in order to obtain the presence of two other judges, one of whom must be a circuit judge, it is convenient to have such hearing for such injunction at Richmond, in the State of Virginia, upon motion of plaintiffs by counsel;

It is therefore ordered that the application for such injunction is set for hearing at 10 o'clock a. m. on the 24th day of February, 1923, in one of the court rooms in the Federal Building in the city

of Richmond, State of Virginia; and that a copy of this order be served upon or accepted by the defendants or their counsel of record as speedily as possible after this date.

79 In United States District Court.

ORDER CONTINUING HEARING.

(Entered February 24, 1923.)

[Title omitted.]

This cause was by order entered herein on the 17th day of February, 1923, set for hearing at Richmond, Virginia, on the 24th day of February, 1923, at the hour of 10 o'clock a. m., and for reasons appearing to the court on that day, after the appearance of counsel representing all the interests therein, it is ordered that said hearing be continued to one of the court rooms in the Federal Building, in the city of Richmond, State of Virginia, on the 30th day of March, 1923.

80 In United States District Court.

ORDER CONTINUING SUSPENSION OF RULING OF INTERSTATE COMMERCE COMMISSION.

(Entered March 30, 1923.)

[Title omitted.]

This cause having come on to be heard on the 30th day of March, 1923, on the complainants' application for a temporary injunction and also on the merits, and it having been moved by the complainants that the temporary stay or suspension of the operation of the decision, ruling and order of December 11, 1922, issued by the Interstate Commerce Commission in the cause before said commission, No. 12083, The New River Company et al. vs. The Virginian Railway Company, and No. 12084, The New River Company et al. vs. The Chesapeake and Ohio Railway Company, and of rule 4 of Circular CS–31, revised, as referred to and described in the bill of complaint in this cause and said motion for continuance of said temporary stay of suspension having, after due notice, been held by three judges, to wit, Hon. C. A. Woods and Hon. Edmund Waddill, jr., circuit judges, and Hon. Geo. W. McClintic, district judge, duly convened for said hearing, all parties being represented at said hearing by their attorneys and evidence having been submitted that irreparable damage would result to the complainants unless said temporary stay or suspension is so continued, which said evidence has been transcribed and identified with reference hereto:

It is found, ordered, adjudged and decreed, two of said judges concurring herein, as follows:

81 1. It is found that irreparable damage would result to the complainants unless said temporary stay or suspension is con-

tinued, as prayed for; that the nature of said damage is that unless said temporary stay or suspension is so continued the transportation facilities for the shipment of coal produced by the complainants will be so reduced that it will be impossible for the complainants to fulfill their deliveries on existing contract obligations for the delivery of coal; that the complainants' labor organization, gradually built up through a period of time, will be disrupted and disorganized; that complainants will suffer injury to the good will of their business and loss of present and future business; that the complainants' plant and equipment will become, in part, idle; that the returns on the lessened amount of coal which the complainants will be able to ship will be unable adequately to carry the overhead charges of complainants' plant and their business, and that the cost of the coal produced by the complainants will be increased to a large amount per ton.

2. It is ordered, adjudged and decreed, that the temporary stay or suspension heretofore granted be continued until the decision of this court upon the complainants' application for a temporary injunction.

It is ordered that the evidence of S. A. Scott, taken before this court and transcribed this 30th day of March, 1923, by a stenographer, and also the evidence of said S. A. Scott, taken on the previous hearing on the granting of a temporary stay or suspension and incorporated as a part of his testimony given on this 30th day of March, 1923, be filed as part of the record in this cause.

Enter above order

EDMUND WADDILL, Jr.,
U. S. Circuit Judge.
GEO. W. MCCLINTIC,
District Judge.

RICHMOND, VA., *March 30, 1923.*

Woods, circuit judge, dissents for reasons heretofore expressed by him.

82 In the United States District Court.

[Title omitted.]

Final order and decree.

Entered Aug. 10, 1923.

This cause came on to be heard on the 30th day of March, 1923, on the prayers and applications of the complainants for a temporary injunction and for a permanent injunction and on the merits of the amended bill and on the supplemental bill and the answers thereto, answers having been filed by all of the parties defendant other than the United States of America and the Interstate Commerce Com-

mission, and the United States of America and Interstate Commerce Commission having stated in open court that they respectively relied upon their motions to dismiss and desire to submit the case without answer or further pleading on behalf of the United States of America and Interstate Commerce Commission and due notice having been given of said hearing on said application for injunctions and on the merits, and said cause having on the evidence submitted been fully heard by three judged, to wit, Hon. C. A. Woods and Hon. Edmund Waddill, jr., circuit judges, and Hon. Geo. W. McClintic, district judge of the District Court of the United States for the Southern District of West Virginia, duly convened for said hearing and having been argued by all parties by their attorneys;

And it appearing (1) that during the period of Federal control of railroads there had been put into effect by the Director General of Railroads a rule of car distribution, known as rule 4 of Circular CS–31, revised, applying to coal mines engaged in the shipment of coal in interstate commerce and served by two or more carriers; (2) that by and pursuant to recommendations of the Interstate Commerce Commission of March 2, 1920, and April 15, 1920, said rule had been kept in force and effect by said carriers until June 21, 1921; (3) that on said date the Interstate Commerce Commission, in a proceeding entitled Fairmont & Cleveland Coal Company et al. vs. Baltimore & Ohio R. R. Co. et al., 66 I. C. C. 269, in which the complainants herein were petitioners and the carriers defendants herein were parties, found and ruled that said rule 4 of Circular CS–31, revised, was unreasonable and unduly prejudicial to mines served in interstate commerce by two or more carriers and that the defendant carriers should for the future distribute cars according to a rule laid down in said decision of June 21, 1921, of the commission as the proper and just rule (to wit, a rule which had been promulgated by the Commission in In re Irregularities in Mine Ratings, 25 I. C. C. 286) and in said decision of June 21, 1921, directed as follows:

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"We shall expect that defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies thereof with us";

(4) that the defendant carriers, pursuant to said finding, decision, and direction so amended their rules and put into effect in place of said rule 4 the rule then directed to be put into effect, known as the Illinois rule;

And it further appearing (5) that subsequently the Interstate Commerce Commission, by its own order, without application of the complainants or carriers defendants herein, and the Illinois rule being still in effect in accordance with the ruling of the commission in the Fairmont case, directed the Fairmont case to be reopened and consolidated with the case known as the Bell & Zoller case; (6) that on December 11, 1922, the commission in said consolidated cases ren-

dered a decision and report in which, in reversal of its previous finding and ruling, it found and ruled:

"The present facts considered, we do not conclude upon these records that the rule attacked, rule 4 of Circular CS–31, re-
84 vised, is in principle unreasonable or unduly prejudicial."

and that—

"Our former conclusions in the Fairmont case, based upon a mistaken adherence to and extension of the decision in the Illinois case, are reversed."

and thereupon entered an order incorporating as a part thereof its decision and report, said order being as follows:

"These cases being at issue upon complaints, answers, and intervening petitions on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

"It is ordered, that the complaints in these proceedings be, and they are hereby, dismissed."

and that by said order so incorporating the findings and conclusions of the commission, rule 4 of Circular CS–31, revised, was again put into effect and made operative and was authorized as the rule of car distribution to be followed by the carriers in lieu of the Illinois rule, and that under and pursuant to said order of December 11, 1922, the carriers herein then published rule 4 effective as of February 1 on defendant, Virginian Railway, and as of February 10, 1923, on defendant, Chesapeake & Ohio Railway, in substitution for the Illinois rule previously put into effect by direction of the commission;

And it further appearing (7) that the complainants are the owners of mines reached and served by each of the defendant carriers in the transportation of coal in interstate commerce; (8) that the defendant carriers are independent and competing carriers; (9) that said order of the commission of December 11, 1922, by which said rule 4 was so again put into effect and authorized was beyond its statutory power and the power which it could constitutionally exercise, and is without warrant of law; that by said order and said rule 4 promulgated and authorized thereby, the complainants are unlawfully deprived and denied lawful rights of transportation, and without due process of law are deprived of and denied property
rights and liberty of contract; that no rule similarly affecting
85 transportation rights has been put into effect by the commission on to any other commodity and that the fact that the commodity to be transported is coal has no bearing on the transportation rights involved; also that the complainants would be irreparably damaged if said order of the commission and said rule 4 are allowed to operate or remain in effect;

It is ordered, adjudged and decreed as follows:

1. That the order of December 11, 1922, of the Interstate Commerce Commission, whereby rule 4 of Circular CS–31, revised, is promulgated and put into effect and authorized is without warrant in law and is null and void.

2. That said order and said rule 4 of Circular CS–31, revised, promulgated, and authorized thereby are hereby set aside and annulled.

3. That the United States of America, the Interstate Commerce Commission and the carriers defendant herein, and each of them, are perpetually restrained and enjoined from restricting, in accordance with said order of December 11, 1922, of the Interstate Commerce Commission, and of rule 4 of Circular CS–31, revised, thereby promulgated and put into effect and authorized, the transportation rights in interstate commerce of the complainants and from so restricting said service by or through any other order or rule to the same effect.

Enter above final order and decree as of the 10th day of August, 1923.

EDMUND WADDILL, JR.,
U. S. Circuit Judge.
GEO. W. MCCLINTIC,
District Judge.

86 In the District Court of the United States for the Southern District of West Virginia.

[Title omitted.]

OPINION.

(Filed August 10, 1923.)

MCCLINTIC, District Judge:

This is a suit in equity, brought under the provisions of the urgent deficiency appropriation act, approved October 22, 1913, found in 38 Statutes L. 219.

This case arises under that part of the act which abolished the Commerce Court, and gave jurisdiction, under certain circumstances, to the District Courts.

When an application is made for an injunction, temporary or permanent, under this act, and the district judge decides that it is a proper case to hear, it becomes his duty to call to his assistance to hear and determine the application, two other judges, one of whom must be a circuit judge.

The bill in this cause was presented to the district judge of the Southern District of West Virginia on the 29th day of January, 1923, and an order was made, filing the bill of complaint, and setting for hearing the application for the temporary restraining order and interlocutory injunction therein prayed for, at the court room of the United States District Court, at Richmond, Virginia, on Tuesday,

February 6, 1923; and further ordered that a copy of the bill be served upon each defendant in said cause.

87 This case came on for hearing before the honorable Charles A. Woods and the honorable Edmund Waddill, jr., circuit judges, and the honorable George W. McClintic, district judge, at Richmond, on the said 6th day of February, 1923.

The defendant, the United States of America, and the defendant, the Interstate Commerce Commission, appeared by counsel, and moved the court to dismiss the bill for want of jurisdiction, and want of equity, for reasons set out in separate written motions, duly filed.

The defendants, the Chesapeake & Ohio Railway Company and the Virginian Railway Company, each appeared by counsel, and filed answers to the bill in this cause.

The Slab Fork Coal Company, and numerous other companies, as intervening defendants, appeared and by leave of court, filed their intervening petition and motion to dismiss, and later filed their answer to the bill of complaint herein.

This cause came on to be heard on the said 6th day of February, 1923, upon the bill and exhibits, upon the motions above set out, and the answers filed, and upon the evidence taken in open court, and a temporary restraining order was entered on the 8th day of February, 1923, staying and suspending the operation of a certain decision, ruling and order of the Interstate Commerce Commission, made on the 11th day of December, 1922, and of rule 4 of Circular CS–31 (revised), for the period of sixty days from said date, pending the application for an injunction.

Later, the bill was amended by leave of court, and the answers of the intervening defendants were also amended by leave of court.

On the 30th day of March, 1923, this cause came on for final hearing before the same judges, and was submitted for decision, and an order was entered continuing the temporary stay and suspension until the final decision upon the application.

88 The bill in this cause was filed by the New River Company and six subsidiary companies, named as plaintiffs. All the stock of the six subsidiary companies is owned by the New River Company, and such companies operate mines situated in Fayette and Raleigh Counties of West Virginia, and in the southern district thereof. Under the designation of the Interstate Commerce Commission, mines in this region are divided into two classes, to wit, "joint mines" and "local mines."

By the designation "joint mines" is meant those mines situated on, and entitled to service from, two or more carriers. By the designation "local mines" there is meant those on, or accessible to, one carrier. In this opinion, they will be so designated for the purpose of convenience.

In this region, there are many mines other than those of the plaintiffs, which are joint mines, and there are many mines which are local mines. The intervening petitioners all own local mines.

The railway companies in this particular case which serve these mines are the Chesapeake & Ohio Railway and the Virginian Railway.

The question which comes up for decision in this case is, whether a joint mine shall be allowed to order such cars as it may need, according to its rated capacity as fixed under the rule, from each railroad, or shall it be allowed only to order such number of cars from both carriers as it would be allowed to order from one carrier.

The history of this question appears from the record in this case to be as follows:

For a period of years prior to the taking of Federal control of railroads, cars were distributed in time of car shortage, to joint mines in the New River fields, by each of the carriers, by what will, for convenience, be referred to as the New River rule; that is, there was no distinction between joint mines and local mines, and cars were distributed to joint mines, according to their proportionate share
89 of the available car supply in that region, as determined by the rated capacity of the shipper, and without reference to, or inquiry into, the car supply furnished by any other railway. The only limitation placed on the mine was, that these orders for cars based on its rating, should not result in a car supply greater than the capacity of the mines to ship. If, in practice, the orders were so placed as to exceed the capacity of the mine to ship, the penalty rule was provided, in order to limit the car supply for its succeeding days, and ultimately, to be reflected in the rated capacity of the mine for the succeeding months.

This rule here described has sometimes been called "the two hundred per cent rule."

By the decision of the Interstate Commerce Commission in the Illinois case (In re Irregularities in Mine Ratings, 25 I. C. C. 286), the commission required that the carrier shall furnish daily to the operators, a statement of the available car supply for the following day. Under the car service rules appended to the bill in this record, the mines place their orders at 4 p. m. on each day for the following day. Where there are two carriers, this rule, known as the Illinois rule, permits the joint mine to order from each carrier, such number of cars as it may need, based on its rated capacity, not to exceed 75 per cent of such rated capacity. This is sometimes called the "one hundred and fifty per cent rule."

When under the law the Government took charge of the railroads, the Director General of Railroads provided for the distribution of cars for mines in accordance with Circular CS–31, rule 4, hereinafter referred to as rule 4. In effect, this rule was, and is, that a joint mine could only order from the carriers one hundred per cent of its rated capacity, and stood in no better position than a local mine; indeed, it was not in so good a position as a local mine, unless it ordered all of its cars from the carrier having the greatest supply of cars on that particular day.

90 This rule 4 continued to be the measure of car distribution so long as Federal control of railroads continued, and there-

after, until the decision of the Interstate Commerce Commission on the 21st day of June, 1921, in the case of Fairmont & Cleveland Coal Company vs. Baltimore & Ohio Railroad Company (62 I. C. C. 629). It was decided by the commission that rule 4 of Circular CS–31, revised, was unreasonable and unduly prejudicial to joint mines, and unduly preferential to local mines, to the extent that it limited the aggregate orders of the joint commission to one hundred per cent of its rated capacity from both roads, and that for the future, during periods of car shortage, the carrier should distribute cars to the joint mines on their lines, considered in that case, on the basis outlined in the Illinois rule, namely, on days when the joint mine orders cars from only one carrier, and on days on which it orders cars from both carriers, its rating on each of such carriers shall be seventy-five per cent of its full rating, subject to the limitation that it shall on no day be supplied with cars in excess of its maximum rating; and that information should be exchanged between carriers, showing the left-over cars, in order to prevent any abuses that might come therefrom.

This rule then continued in force until a decision was entered by the Interstate Commerce Commission on the 11th day of December, 1922, in the case of Bell & Zoller Coal Company et al. vs. Baltimore & Ohio Southwestern Railroad Company et al., wherein an order was entered and an opinion filed, reversing the opinion in the Fairmont case, supra, and again putting into effect rule 4 of Circular CS–31, revised.

Following this decision, the carriers, the Cheapeake & Ohio Railway Company, and the Virginian Railway Company, arranged to put into effect said rule 4, the one on the first day of February, 1923, and the other on the 10th day of February, 1923.

This suit was instituted to enjoin such acts on the part of the
91 carriers, and action was taken therein as above set forth, relative to the temporary restraining order.

The question is raised whether this court has any jurisdiction. It is claimed that it has none, on the ground that the decision of the Interstate Commerce Commission is negative, and no appeal can be taken therefrom, under the ruling of the Supreme Court in the case of Proctor & Gamble Company vs. United States 225 (U. S. 286).

This question is raised by the motions to dismiss, filed by the United States and Interstate Commerce Commission, and by intervening defendants.

Without going into a full discussion thereof, we are of opinion that the decision of the Interstate Commerce Commission was in substance and effect affirmative, and that the carriers so understood it, and acted upon it, as an affirmative order, and in consequence thereof, took affirmative action; and the results, so far as the rights claimed by the plaintiffs were concerned, was the same as if the

order had been affirmative in form. It is a case in which we must deal with the substance and not the form.

We are therefore of opinion that the Proctor & Gamble case, and other cases of like nature, do not apply here, and that this court has jurisdiction to pass upon the questions raised by the pleadings.

The facts developed by the evidence show very large expenditures made by its plaintiffs, for the purpose of shipping coal by the two carriers. It is also shown, that the shortage of cars on each carrier continues most of the time, and that the right to ship coal by each carrier, is a valuable property right. If the right to ship by each carrier, and to receive cars from each carrier, on the basis of rated capacity, is denied to the plaintiffs, and to other shippers in like condition, the financial loss will be very great, and the value of their properties will be greatly depreciated. Much larger prices have been paid for mines which had access to the lines of two carriers, than would be thought of, for similar mines, with access only
92 to the line of one carrier. When there is any real market for coal, car shortage has always existed, and so far as can be foreseen, will always exist. This case would not have arisen if each carrier had always on hand a sufficient supply of cars, to take care of the demands of each shipper.

The shipper of any commodity who has access to more than one carrier, has a right to choose one carrier, or to divide his goods among 2 or more carriers, with the advantages naturally belonging to such location, giving such access; and while the Interstate Commerce Commission has, under the law, certain powers of regulation, yet it is beyond such powers to deprive the shipper of such right, under the guise of regulation, or to limit such right in such way as to amount to the deprivation thereof.

From the adjudged cases, it is plainly to be seen, that the Interstate Commerce Commission has no authority to so exercise its powers so arbitrarily as virtually to transcend such authority conferred, although it may be not technically doing so.

Proctor & Gamble Co. vs. United States, supra.

A so-called regulation which destroys at least thirty per cent of the market value of a coal property, certainly transcends such authority. It is a taking of private property without due process of law, by depriving the owner of the power to use it in a legitimate and proper way, for the commercial purpose for which it was designed and developed, by the large extra expenditures of money as shown by the evidence in this cause.

Of course a commercial advantage will accrue to the joint mine, over the local mine, by the abrogation of rule 4, but in our opinion, that advantage constitutionally belongs to it, by reason of its location, and one that the Interstate Commerce Commission can not order the carriers to take away from it, and one of which the carrier cannot legally deprive it.

A question analogous to this was before a three judge court in Pennsylvania recently, in the case of the Pennsylvania Railroad
93 Company vs. United States, and the court therein decided, that the order of the Interstate Commerce Commission was erroneous, and the same was enjoined and suspended.

Davis, circuit judge, in the opinion of the court, in deciding that the industries, situated in a certain zone, where they had access to two carriers, were entitled to such advantage over those out of the zone, and on the line of one carrier, said:

"It has been repeatedly held that where one company serves a community or industry located on the tracks of another under a trackage arrangement, the situation in effect is the same as if the former company had extended its own tracks to such community or industry. (Commercial Club of Superior, Wis., vs. Great Northern Railway, 24 I. C. C. 96; Penick & Ford v. Director General, 61 I. C. C. 173; Louisville & Nashville Railroad vs. United States et al., 242 U. S. 60.) The industries, therefore, located along the tracks of either company in the zone are in law to be considered as on the individual tracks of both companies, and the industries beyond this zone as located on the tracks of one of the companies only. Consequently, in legal effect, these industries which are within the zone and those without the zone are not similarly situated, but are in a substantially different position. And so the advantage enjoyed by the industries within the zone over those without the zone is not, within the meaning of the act, an undue or unreasonable preference. (Ridge Coal Mining Co. v. Missouri Pacific R. R. Co., 62 I. C. C. 259; Dering Mines Co. et al. vs. Director General, 62 I. C. C. 265; Louis-
94 ville & Nashville Railroad Company, et al. vs. United States et al., supra.) 'A carrier must use its existing facilities impartially,' and the railroads, under the facts in this case, are under no obligation to extend or curtail their facilities. The legal position of the industries in the zone is just the same as though they were located at some other part of the city away from the tracks. An industry selecting a disadvantageous location for reasons justifiable to itself has no right to call upon the carriers to overcome such disadvantage at their expense and this is what the industries outside of the zone, so far as the legal situation is concerned, did."

We mean only to hold that Circular CS–31, rule 4 (revised), and the action of the carriers in putting it in force, is erroneous, and must be enjoined and suspended.

The order will be entered without prejudice to the Interstate Commerce Commission making proper orders relative to reasonable car distribution, to joint as well as local mines, not in conflict with the views hereinbefore expressed.

(Endorsed.)

I concur,

EDMUND WADDILL, Jr.,
U. S. Circuit Judge.

[File endorsement omitted.]

95 In the District Court of the United States for the Southern District of West Virginia.

[Title omitted.]

DISSENTING OPINION.

(Filed August 10, 1923.)

Woods, Circuit Judge, dissenting:

The rule for distribution of cars to coal mines other than anthracite mines, in time of shortage, established while the railroads were under Government control, was as follows:

"Copies of orders for cars for a mine that is joint with any other carrier (steam, electric, or water) shall be filed with the designated representative of each such carrier, such combinations of orders must not exceed the gross daily rating of the mine."

Joint mines are those served by two or more carriers. Local mines are those served by only one carrier. The rule meant that in car distribution joint mines were to be rated on the same basis as local mines; that is, they were to have no advantage by reason of the double service. After release of the railroads from Federal control the Interstate Commerce Commission recommended that carriers continue the rule in force "until such time as the experience of the carrier or the commission should dictate other and more appropriate rules for the rating and distribution of cars to coal mines."

96 On January 11, 1921, the complainants in this case filed complaints before the Interstate Commerce Commission against the Chesapeake and Ohio Railway Company and the Virginian Railway Company alleging the rule hereinbefore quoted, now known as rule 4 of Circular CS-31, to be unduly preferential to complainants' competitors, the local mines. These cases before the Interstate Commerce Commission, known as Nos. 12083 and 12084, were consolidated with Nos. 12081 and 12082, similar in character. After hearing, the commission found rule 4 to be unjustly and unreasonably favorable to local mines; and further found that the joint mines should have a rating in car distribution in the proportion of 150 per cent for the joint mines to 100 per cent for the local mines. That is, the joint mines might have 75 per cent on each carrier as against 100 per cent to the local mines on one carrier. At the conclusion of the opinion the commission said:

"We have not required that car service rules be filed as tariff schedules. We will not in this proceeding direct that the rules which we herein find to be reasonable be so filed. We shall expect, however, that defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies thereof with us."

No order was made by the commission. Similar complaints by coal operators in Indiana and Illinois had been filed before the commission, known as Bell & Zoller Coal Company et al. *v.* Baltimore & Ohio Southwestern Railroad Company et al., Nos. 12362 and

12399. While these last complaints were pending a petition was filed before the Interstate Commerce Commission by the owners coal operators in Indiana and Illinois had been filed before the com- of local mines concerned to reopen the former holding of the commission in Nos. 12083 and 12084 that the 150 per cent rule in favor of joint mines was just and reasonable. The cases were con-
97 solidated. After full hearing of evidence and argument, the commission reversed its former conclusions and found that rule 4—the equality rule without regard to whether a mine was served by one road or more—was just and reasonable. The complaints of the owners of all the joint mines, including those of the complainants in this suit, were dismissed by the following order:

"These cases being at issue upon complaints, answers, and intervening petitions on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

"It is ordered, that the complaints in these proceedings be, and they are hereby, dismissed."

There was never any order or even final determination of the commission to put into effect any rule or to interfere with rule 4 of the railroads. The conclusions announced in its opinion were reopened, reconsidered, and changed; but all this was done in one consolidated proceeding, which was never ended until the commission made the order above quoted. This last order was a final dismissal of the complaints and a refusal to take any action with respect to rule 4 of the railroads. It was, therefore, a negative order—a mere refusal to interfere with an existing rule. As such it was not reviewable by this court. (Proctor & Gamble v. United States, 225 U. S. 282.) The action of the Interstate Commerce Commission in the case cited had more the semblance of affirmative action than in this, for there Proctor & Gamble asked the revocation or modification of a rule expressly approved by the commission, while here, in a continuous proceeding, the commission merely reached the ultimate conclusion that it would not interfere with an existing rule of the
98 railroads. I therefore think the court had no jurisdiction whatever to enjoin the railroads from operating under rule 4 as a rule established by affirmative action of the Interstate Commerce Commission.

Even, however, if rule 4 had been adopted and put into effect by the Interstate Commerce Commission, it seems to me perfectly clear that this court has no power to change it. It it apparent from the above statement that the Interstate Commerce Commission has devoted much time and care to the consideration of the justness and reasonableness of the rule. To say the least, it cannot be doubted that the whole matter is debatable and that there are very

strong reasons in favor of rule 4 as distinguished from the 150 per cent rule claimed by the complainants. Even if this court entertains the opinion that the action of the commission was unwise and improper, that affords no ground to say that a prima facie case for an injunction has been made out. (Interstate Commerce Commission v. Illinois Cent. R. R., 215 U. S. 452, 478, 30 Sup. Ct. 155, 54 L. Ed. 280; Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; Manufacturers' Ry. Co. v. United States, 246 U. S. 457; Skinner & Eddy Corporation v. United States, 249 U. S. 557, 562; Seaboard Air Line Ry. Co. v. United States, 254 U. S. 57, 62; Akron, Canton & Youngstown Ry. Co. v. United States, — U. S. — decided February 19, 1923.) The authority of this court is "confined to determining whether there had been violations of the Constitution, or of the proper conferred by statute, or an exercise of power so arbitrary as virtually to transcend the authority conferred. (Interstate Commerce Commission v. Illinois Central R. Co., 215 U. S. 452, 470; Interstate Commerce Commission v. Union Pacific R. Co., 222 U. S. 541, 547; Proctor & Gamble v. United States, 225 U. S. 282, 297; Interstate Commerce Commission v. Baltimore & Ohio R. Co., 225 U. S. 326, 340.)" (Kansas City So. Ry. v. United States, 231 U. S. 439, 440.)

There is no ground for the argument that the refusal of the Interstate Commerce Commission to set aside rule 4 is an in-
99 vasion of any constitutional right of the plaintiffs. (Akron Canton & Youngstown Ry. Co. v. United States, — U. S. —, decided Feb. 19, 1923.) The court has no power under the statute to regulate interstate commerce; it can only interfere with the action of the Interstate Commerce Commission when the commission has taken affirmative action contrary to the Constitution or the statute, or has taken such arbitrary action as to virtually transcend its authority. To grant the injunction on this debatable question seems to me to be setting up the judgment of the court upon a question of fact against the findings of the Interstate Commerce Commission. and that is beyond the power of the court.

[File endorsement omitted.]

100 In the District Court of the United States for the Southern District of West Virginia.

[Title omitted.]

PETITION FOR APPEAL BY UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION.

(Filed October 6, 1923.)

United States of America and Interstate Commerce Commission, defendants, feeling themselves aggrieved by the final order or decree of the District Court made and entered August 10, 1923, pray an appeal to the Supreme Court of the United States therefrom.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

Defendants pray that a transcript of the record, proceedings, and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

ELLIOT NORTHCOTT,
United States Attorney,
Southern District of West Virginia.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
J. CARTER FORT,
Solicitor for the Interstate Commerce Commission.

101 [File endorsement omitted.]

In the District Court of the United States for the Southern District of West Virginia.

[Title omitted.]

ASSIGNMENT OF ERRORS BY AND ON BEHALF OF THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

(Filed October 6, 1923.)

United States of America and Interstate Commerce Commission, defendants, now come by their respective counsel, and in connection with their petition for appeal, file the following assignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the final order or decree of the District Court entered August 10, 1923.

The District Court erred:

I. In denying the motion of the United States to dismiss the bill of complaint and in not sustaining the motion.

II. In denying the motion of the Interstate Commerce Commission to dismiss the bill of complaint and in not sustaining the motion.

102 III. In ordering, adjudging and decreeing that the order of December 11, 1922, of the Interstate Commerce Commission, be set aside and annulled.

IV. In ordering, adjudging, and decreeing that rule 4 of Circular CS–31, revised, be set aside and annulled.

V. In perpetually enjoining the United States of America, Interstate Commerce Commission, and the defendant railroad companies, from—

"restricting, in accordance with said order of December 11, 1922, of the Interstate Commerce Commission, and of rule 4 of Circular CS–31, revised, thereby promulgated and put in effect and author-

ized, the transportation rights in interstate commerce of the complainants and from so restricting said service by or through any other order or rule to the same effect."

VI. In holding that the order of December 11, 1922, of the Interstate Commerce Commission, is an affirmative order.

VII. In holding that the court had jurisdiction of the subject matter of this suit.

VIII. In holding that the order of the Interstate Commerce Commission resulted in a taking of private property without due process of law.

IX. In holding that the Interstate Commerce Commission required the defendant carriers to put into effect Circular CS–31, rule 4, revised.

X. In holding that the Interstate Commerce Commission was without power to require defendant carriers to put in force and effect Circular CS–31, rule 4, revised.

XI. In substituting its judgment for the judgment of the Interstate Commerce Commission concerning a regulation pertaining to the distribution of cars for the transportation of coal in interstate commerce.

XII. In making and entering a final order or decree in
103 violation of equity rule 71 by reciting and stating therein (a) prior proceedings before the United States Railroad Administration during the period of Federal control and (b) prior proceedings before the Interstate Commerce Commission, and by further including therein a special finding of facts.

Wherefore, defendants, and each of them, pray that the final order or decree of the District Court may be reversed, annulled, and set aside, with directions that the permanent injunction shall be dissolved and the bill of complaint dismissed, and for such other and further order as may be appropriate.

ELLIOTT NORTHCOTT,
United States Attorney,
Southern District of West Virginia.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
J. CARTER FORT,
Solictor for the Interstate Commerce Commission.

[File endorsement omitted.]

104 In the District Court of the United States for the Southern District of West Virginia.

[Title omitted.]

ORDER ALLOWING APPEAL OF UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

In the above-entitled cause, United States of America and Interstate Commerce Commission, defendants, having made and filed

their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and citation made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings and papers on which said order or decree was made and entered to the Supreme Court of the United States.

EDMUND WADDILL, Jr.,
United States Circuit Judge.
GEO. W. MCCLINTIC.
United States District Judge.

105 Citation on appeal (filed October 6, 1923). [Omitted in printing.]

106 (Acceptance of service.)

Service of the foregoing citation and the receipt of a copy thereof is hereby acknowledged this 9th day of October, 1923.

JAMES W. CARMALT,
Solicitors for all Appellees.

[File endorsement omitted.]

107 In the District Court of the United States for the Southern District of West Virginia.

[Title omitted.]

NOTICE OF THE APPEAL OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION.

(Filed October 6, 1923.)

To The Chesepeake and Ohio Railway Company and The Virginian Railway Company, defendants, and Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, Turkey Knob Coal Company, Coal Run Coal Company, Branch Coal Company, Beechwood Coal and Coke Company, Greenwood Coal Company, Laurel Creek Coal Company, Quinnimont Coal Company, Maryland-New River Coal Company, Star Coal & Coke Company, Ephriam Creek Coal & Coke Company, Stover Coal Company, Intervenors:

You are hereby notified that the United States of America and the Interstate Commerce Commission will prosecute an appeal from the final order or decree of the District Court, entered August 10, 1923, in the above-entitled cause, in which you are parties defendants and intervenors, respectively, to the Supreme Court of the United States, to reverse the decree rendered in the said cause. This notice is

seasonably given that you may have full opportunity to de-
108 termine your own course with respect to appeals.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

Service of a true copy of the foregoing notice is hereby acknowledged this fifth day of October, A. D. 1923.

W. S. BRONSON,
SHERLOCK BRONSON,
Solicitors for the Chesapeake & Ohio Railway Company.
WILLIAM LOYALL &
TIM FALL,
Solicitors for the Virginian Railway Company.
GEO. T. BELL,
Solicitors for the foregoing intervenors.

[File endorsement omitted.]

109 In United States District Court.

[Title omitted].

(Filed October 6, 1923.)

NOTICE OF APPEAL.

To the honorable E. D. ENGLAND,
Attorney General of the State of West Virginia.

You are hereby notified that the defendants above named have taken an appeal from the final decree of the District Court to the Supreme Court of the United States and that the order allowing the appeal makes the same returnable within thirty (30) days from the date of the order.

This notice is given you pursuant to urgent deficiencies act, October 22, 1913 (38 Stat. 221).

ELLIOTT NORTHCOTT,
United States Attorney,
Southern District of West Virginia.

OCTOBER 5, 1923.

I hereby acknowledge receipt of a copy of the above notice this 5th day of October, A. D. 1923.

E. T. ENGLAND,
Attorney General of the State of West Virginia.

110 Marshal's Return.

Received this writ at Charleston, W. Va., Oct. 4, 1923, and served same on E. T. England at Charleston, W. Va., Oct. 5, 1923, by delivering a true copy of this writ to his person as within I am commanded.

SIEGEL WORKMAN, *U. S. Marshal,*
By O. W. MARTIN, *Dept.*

[File endorsement omitted.]

111 In the District Court of the United States for the Southern District of West Virginia.

[Title omitted.]

PRÆCIPE FOR TRANSCRIPT OF RECORD.

(Filed October 6, 1923.)

To the Clerk:

Please prepare a transcript of the record in the above-entitled cause in the matter of an appeal of the United States of America and Interstate Commerce Commission and include therein, in the order given below, the following matter, viz:

1. Bill of complaint, as amended, and supplemental bill.
2. Motion of the United States to dismiss.
3. Motion of the Interstate Commerce Commission to dismiss.
4. Interlocutory decree.
5. Dissenting opinion of Circuit Judge Woods.
6. All orders and journal entries in their appropriate order.
7. Opinion of the court by District Judge McClintic.
8. Final decree entered August 10, 1923.
9. Petition for appeal.
10. Assignment of errors.
11. Order allowing appeal.
12. Citation.
13. Notice of appeal to defendants and intervenors.
14. Notice of appeal to Attorney General of West Virginia.
15. Præcipe for record.

ELLIOTT NORTHCOTT,
United States Attorney,
Southern District of West Virginia.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
J. CARTER FORT,
Solicitor for Interstate Commerce Commission.

112 Service of a copy of the within præcipe for record is hereby admitted and acknowledged this 9th day of October A. D., 1923.

JAMES W. CARMALT,
Solicitor for all Appellees.

[File endorsement omitted.]

113 In United States District Court.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Southern District of West Virginia, ss:

I, Ira H. Mottesheard, clerk of the District Court of the United States for the Southern District of West Virginia, do certify that

the foregoing is a true and correct transcript of the record and proceedings, as indicated and called for by the præcipe on appeal filed by the United States and the Interstate Commerce Commission, in the case of The New River Company et al. vs. Chesapeake & Ohio Railway Company et al. and now of record and on file in my office.

In testimony whereof I hereto set my hand and the seal of said court, at Charleston, in said district, this 29th day of October, A. D., 1923, and in the 148th year of the independence of the United States of America.

[SEAL.]

IRA H. MOTTESHEARD,
Clerk, D. C., U. S. S. D., W. Va.

[Endorsement on cover:] File No. 29937. S. West Virginia, D. C., U. S. Term No. 627. The United States of America and Interstate Commerce Commission, appellants, vs. The New River Company, White Oak Fuel Company, Stuart Colliery Company, et al. Filed November 6th, 1923. File No. 29937.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*,

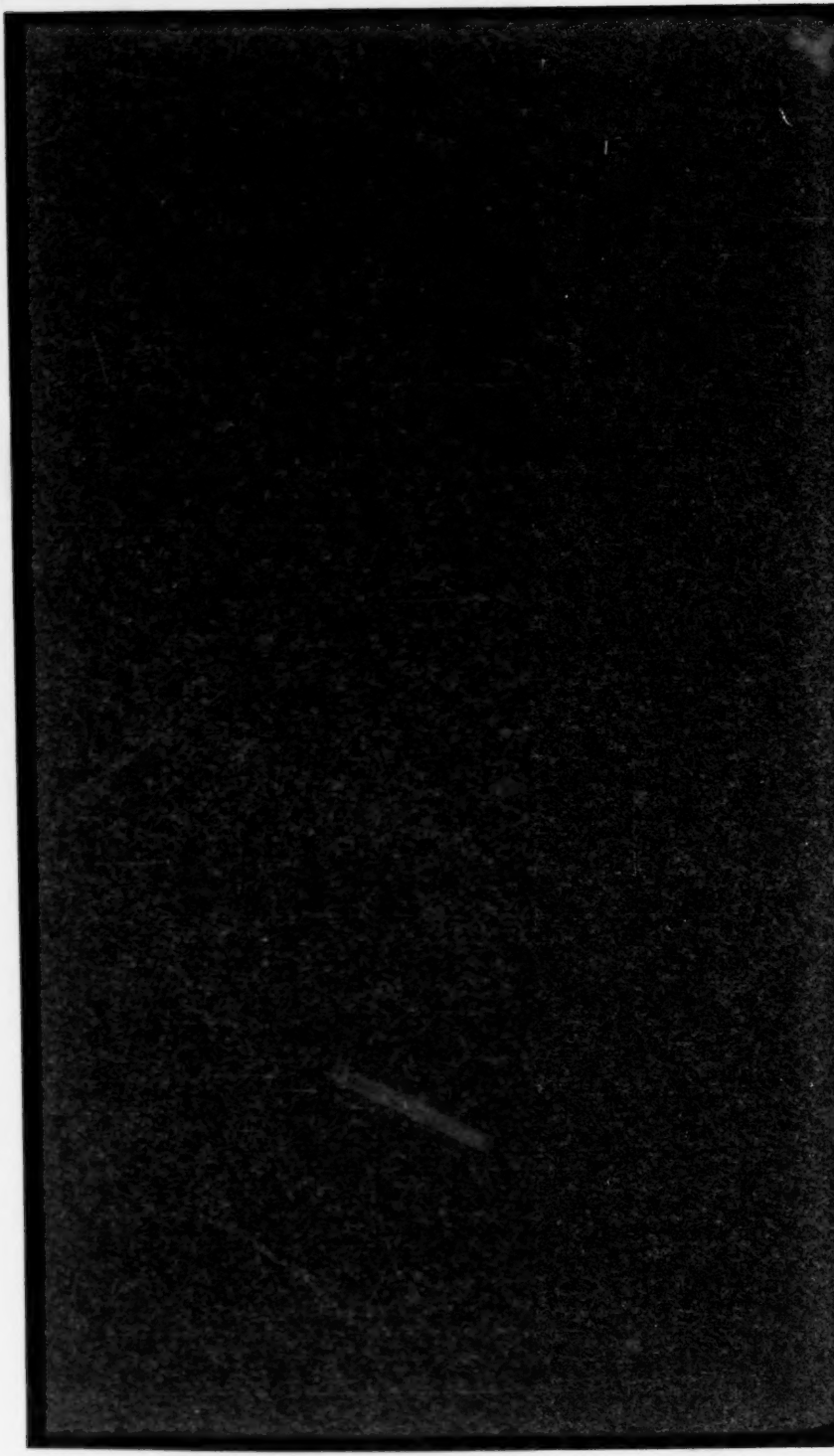
vs.

THE NEW RIVER COMPANY, NEW RIVER COAL COMPANY, STUART COLLIERY COMPANY, DUNLOUP COAL & COKE COMPANY, BRADLEY COAL & COKE COMPANY, MACCORKLE COAL & COKE COMPANY AND CRANBERRY FUEL COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

BRIEF FOR THE UNITED STATES

R. Lincoln Printing Company, Law Printers, Washington, D. C.



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In the Supreme Court of the United States

OCTOBER TERM, 1923

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, appellants,

v.

THE NEW RIVER COMPANY, WHITE OAK FUEL COMPANY, STUART COLLIERY COMPANY, DUNNLOOP COAL & COKE COMPANY, BECKLEY COAL & COKE COMPANY, MABSCOTT COAL & COKE COMPANY, AND CRANBERRY FUEL COMPANY } No. 627

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR THE UNITED STATES

STATEMENT

Six complaints were brought before the Interstate Commerce Commission which were disposed of by the following order,[1] viz (Tr. 43):

> It is ordered, That the complaints in these proceedings be, and they are hereby, dismissed.

[1] This order of dismissal is preceded by the following recital:

These cases being at issue upon complaints, answers, and intervening petitions on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

The appellee companies then filed the bill to review these proceedings and prayed for an order contrary to that entered by the Commission and for appropriate injunctions to make such contrary order of the court effective.

Circuit Judge Waddill and District Judge McClintic concurring (Tr. 53) and Circuit Judge Woods dissenting (Tr. 59), the District Court entered the final decree (Tr. 50). With a full finding of facts embodied therein, the decree adjudged (Tr. 53):

> 1. That the order of December 11, 1922, of the Interstate Commerce Commission, whereby rule 4 of Circular CS–31, revised, is promulgated and put into effect and authorized is without warrant in law and is null and void.
>
> 2. That said order and said rule 4 of Circular CS–31, revised, promulgated, and authorized thereby are hereby set aside and annulled.
>
> 3. That the United States of America, the Interstate Commerce Commission, and the carriers defendant herein, and each of them, are perpetually restrained and enjoined from restricting, in accordance with said order of December 11, 1922. of the Interstate Commerce Commission, and of rule 4 of Circular CS–31, revised, thereby promulgated and put into effect and authorized, the transportation rights in interstate commerce of the complainants and from so restricting said service by or through any other order or rule to the same effect.

THE FACTS.

The undisputed material facts may be stated within narrow compass. In Fayette and Raleigh Counties, West Virginia, are located the New River Coal fields, which are served by the Chesapeake & Ohio and Virginian Railway companies. Those mines which are served by both companies are known as "joint mines" and those which are served by only one company are known as "local mines" (Tr. 54). The New River Company (which owns all of the stock of the other appellees) (Tr. 2) and its six subsidiaries are "joint mines." In those fields are also "local mines" who are interested (Tr. 26; see also No. 628).

On December 26, 1917, by proclamation, the President took possession and assumed control and operation of the railroads (40 Stat. 1733). Through his car service section, the Director General, in rating the coal mines other than anthracite in periods of car shortage, promulgated rule 4 (formerly rule 2) of Circular CS–31, viz (Tr. 19, 23):

> Copies of orders for cars for a mine that is joint with any other carrier (steam, electric, or water) shall be filed with a designated representative of each such carrier. Such combinations must not exceed the gross daily rating of the mine.

The practical operation of the rule is as follows (Tr. 29):

Mine A is a joint mine served by the Chesapeake & Ohio and Virginian; mine B is local to the Chesapeake

& Ohio, while mine C is local to the Virginian. Each has a daily rating of 20 cars. On a certain day the Virginian has a 70 per cent car supply, and the Chesapeake & Ohio a 50 per cent car supply. Mine A divides its order between the Chesapeake & Ohio and the Virginian; that is, it orders 10 cars from each carrier. Local mines B and C each orders 20 cars. As the car supply of the Chesapeake & Ohio is 50 per cent it would furnish mine A with 5 cars, while the Virginian, with a 70 per cent car supply, would furnish 7 cars, or a total of 12 cars from both roads. Mine B would receive 10 cars from the Chesapeake & Ohio, and mine C 14 cars from the Virginian.

This rule continued in force and effect to the end of Federal Control, February 29, 1920, and thereafter under the provisions of the Transportation Act[2] and the recommendation of the Commission by the circular dated March 2, 1920, "that the

[2] Section 208, which terminated Federal Control, provides (41 Stat. 464):

Sec. 208. (*a*) All rates, fares, and charges, and all classifications, regulations, and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare, or charge, unless such reduction or change is approved by the Commission.

(*b*) All divisions of joint rates, fares, or charges, which on February 29, 1920, are in effect between the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by mutual agreement between the interested carriers or by State or Federal authorities, respectively.

carriers, both those defendant herein and all others subject to the interstate commerce act, continue in force the said Circular CS–31, revised, until such time as the experience of the carriers or the commission should dictate other and more appropriate rules for the rating and distribution of cars to coal mines; and in accordance with and in compliance with said action of the commission, the rules of said circular were continued in force" by the Chesapeake & Ohio and Virginian Railway companies (Tr. 8).

Subsequently, on July 8, 1920, the two carriers named applied for permission to abrogate rule 4, the application was denied and rule 4 was continued in effect (Tr. 8). On July 11, 1921, formal complaints were filed assailing rule 4 and after hearing the Commission on June 21, 1921 (Tr. 25), found that rule 4 was unjust, unreasonable, and unduly prejudicial (Tr. 25, 9). The previous rule, always referred to as the "Illinois Rule,"[3] was recommended by the Commission without any formal order directing that the same shall be put in force (Tr. 25–32).

[3] The District Court said (Tr. 55; 293 Fed. Rep. 462):

"The history of this question appears from the record in this case to be as follows:

"For a period of years prior to the taking of Federal control of railroads, cars were distributed in time of car shortage, to joint mines in the New River fields, by each of the carriers, by what will, for convenience, be referred to as the New River rule; that is, there was no distinction between joint mines and local mines, and cars were distributed to joint mines, according to their proportionate share of the available car supply in that region, as determined by the rated capacity of the shipper, and without reference to, or inquiry into, the car supply furnished by any other railway. The only limitation placed on the mine was that these orders for cars, based on its rating, should not result in a car supply greater than the capacity of the mines to ship. If, in practice, the orders were so placed as to exceed

Subsequently, the proceedings were reopened and consolidated with other proceedings relating to mines and carriers located in Illinois and Indiana and after further hearing, the Commission, on December 11, 1922, filed its report and entered the order dismissing outright all of the several complaints. The Commission said (Tr. 41):

> The present facts considered, we do not conclude upon these records that the rule attacked, rule 4 of Circular CS–31, revised, is in principle unreasonable or unduly prejudicial. Our former conclusions in the *Fairmont case*, based upon a mistaken adherence to and extension of the decision in the *Illinois case*, are reversed.

As a result of the order dismissing the several complaints, rule 4 of Circular CS–31, revised, was allowed to stand.

The bill of complaint attacks not only the order of dismissal but rule 4 as well.

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the capacity of the mine to ship, the penalty rule was provided, in order to limit the car supply for its succeeding days, and ultimately, to be reflected in the rated capacity of the mine for the succeeding months.

"This rule here described has sometimes been called 'the two hundred per cent rule.'

"By the decision of the Interstate Commerce Commission in the Illinois case (In re Irregularities in Mine Ratings, 25 I. C. C. 286), the commission required that the carrier shall furnish daily to the operators a statement of the available car supply for the following day. Under the car service rules appended to the bill in this record, the mines place their orders at 4 p. m. on each day for the following day. Where there are two carriers, this rule, known as the Illinois rule, permits the joint mine to order from each carrier, such number of cars as it may need, based on its rated capacity, not to exceed 75 per cent of such rated capacity. This is sometimes called the 'one hundred and fifty per cent rule.' "

ARGUMENT

I

The Order Directed No Affirmative Relief, it is Purely Negative, and One Which the District Court Should Not Have Reviewed

The bill of complaint as amended and supplemental bill in this case appears to have been modeled after the bills in *Procter & Gamble Co.* v. *United States*, 225 U. S. 282; *Hooker* v. *Knapp* and *Eagle White Lead Co.* v. *Interstate Commerce Commission*, 225 U. S. 302. In those cases the railroad companies were also named as defendants in order that injunctions may be prayed against them. The order of dismissal of the Commission in the instant case is certainly identical in form with the orders of dismissal of the Commission in those cases.

In the *Procter & Gamble case*, as in this case, the order of dismissal allowed the rule to stand as binding upon both carriers and shipper, and the rule and not the order of dismissal was made the foundation of the bills in equity. Thus, Mr. Chief Justice White, in stating the form of the action, said (225 U. S. 287):

> In February, 1911, the Procter & Gamble Company filed a petition in the Commerce Court of the United States making defendants the United States, the Interstate Commerce Commission, and the railroads who had been complained of in the proceeding before the Commission. The petition recited the facts stated above as to the character of

> the business of the petitioner, the ownership of tank cars, etc., the establishment of the rules for demurrage, their repugnancy to the act to regulate commerce, the injury which had resulted from being compelled to pay the charges for demurrage in accordance with the rules, the application made to the Commission, and the refusal of that body to award relief. The conception upon which the petition was based is shown in the excerpt in the margin, wherein it was also charged that the order of the Commission dismissing the complaint as above set forth "is null and void and beyond the power of said Interstate Commerce Commission, in that it sustains the validity of * * * said demurrage rules."

In that case, as in this case, the defendant carriers answered the bill. The United States moved to dismiss for want of jurisdiction (225 U. S. 289).

The Commerce Court took jurisdiction of the controversy, held that the Commission had rightly decided and then entered an order dismissing the petition on the merits.

On the appeal of Procter & Gamble, this Court reversed the judgment of the Commerce Court and sustained the motion of the United States to dismiss for want of jurisdiction on the ground that the order was negative. The Supreme Court referred to the decision of the Commerce Court which had held that the order of dismissal of the Commission was *in effect* the equivalent of an order of the Com-

mission granting affirmative relief, thus (225 U. S. 290):

> In disposing of the case, the court considered it in a two-fold aspect—first, as to its jurisdiction; and, second, as to the merits of the case. On the first subject it held, *a*, that it had jurisdiction of the cause, and that the refusal of the Interstate Commerce Commission to afford relief to the Procter & Gamble Company was, for the purposes of jurisdiction of the court, the exact equivalent of an order of the Commission granting affirmative relief, and, *b*, as a corollary of this power it was further decided that there was jurisdiction to award pecuniary relief for demurrage if any was illegally exacted.

In *Lehigh Valley Railroad Co.* v. *United States*, 243 U. S. 412, 414, the Act of August 24, 1912 (c. 390, sec. 11, 37 Stat. 560, 566), known as the Panama Canal Act, prohibited, after July 1, 1914, any ownership by a railroad in any common carrier by water when the railroad might compete for traffic with the water carrier; the Commission was authorized to determine questions of fact as to such competition. On application of carriers the Commission was authorized to extend the time for the relinquishment of the ownership if the extension would not exclude or reduce competition on the water route. Lehigh Valley filed a petition praying for a hearing as to whether the services of a steamship line owned by it would be in violation of the act and for an extension of time. The petition was dismissed and the statute became abso-

lute against the company (33 I. C. C. 699, 706, 716; 37 I. C. C. 77). The bill was filed to prevent the enforcement of the order of the Commission. The District Court denied the injunction and dismissed the bill (234 Fed Rep. 682). In holding that the District Court was without jurisdiction over the report and order of the Commission, this Court said (243 U. S. 414):

> Three judges sitting in the District Court denied the injunction asked and dismissed the bill (234 Fed. Rep. 682). Although they proceeded to discuss the merits of the case they intimated at the outset a strong doubt whether in any event an injunction could be granted. If this doubt was well founded there is nothing more to be said, *since the ground of jurisdiction is gone.* * * *
>
> The order of the Commission was negative in substance as well as in form. *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, 292, 293. (Italics ours.)

The dissenting opinion of Circuit Judge Woods, who presided on the first hearing, conforms to the foregoing opinions; thus (Tr. 60):

> There was never any order or even final determination of the commission to put into effect any rule or to interfere with rule 4 of the railroads. The conclusions announced in its opinion were reopened, reconsidered, and changed; but all this was done in one consolidated proceeding, which was never ended until the commission made the order above quoted. This last order was a final dismissal of the com-

plaints and a refusal to take any action with respect to rule 4 of the railroads. It was, therefore, a negative order—a mere refusal to interfere with an existing rule. As such it was not reviewable by this court. *Procter & Gamble* v. *United States*, 225 U. S. 282. The action of the Interstate Commerce Commission in the case cited had more the semblance of affirmative action than in this, for there Procter & Gamble asked the revocation or modification of a rule expressly approved by the commission, while here, in a continuous proceeding, the commission merely reached the ultimate conclusion that it would not interfere with an existing rule of the railroads. I therefore think the court had no jurisdiction whatever to enjoin the railroads from operating under rule 4 as a rule established by affirmative action of the Interstate Commerce Commission.

The only difference between the orders of dismissal in the *Procter & Gamble Case* and the instant case is that the former case assailed rule 9 of the demurrage rules and this case assails rule 4 of the coal car distribution rules. In all other respects, except as pointed out by Judge Woods, they are similar in form, substance, and effect.

Either the decree of the District Court must be reversed with directions that the suit shall be dismissed or the opinion and judgment of this Court in the *Procter & Gamble case* must be overruled.[4] There

[4] The *Procter & Gamble case* has since been cited with approval or distinguished (but never overrruled) in the following cases: *Hooker* v. *Knapp*, 225 U. S. 302, 305; *United States*, v. *Baltimore & Ohio*, 225, U. S. 306, 323; *Atchison, Topeka & Santa Fe* v. *United States* 231 U. S. 736; *Tap Line cases*, 234 U. S. 1, 22; *United States* v. *Illinois Central*, 244 U. S. 82, 87; *Lehigh Valley* v. *United States*, 243 U. S. 412,

190 U. S. 316; *Ness* v. *Fisher*, 223 U. S. 683; *Hall* v. *Payne*, 254 U. S. 343; or to be used as a writ of error, *Commissioner of Patents* v. *Whiteley*, 4 Wall. 522.

In the *Waste Merchants case* it was held that courts may not undertake to compel the Commission to decide a certain way a case over which its jurisdiction was not questioned. In the instant case the jurisdiction of the Commission is not only conceded but it was invoked by the same parties who lost their case and who subsequently filed the bill of complaint. As in the *Waste Merchants case*, they now seek by mandatory injunction to gain what they lost. Effective regulation of the distribution of cars to coal mines in times of car shortage will not result from such divided authority.

III

The Subject of Mine Ratings Is Within the Jurisdiction of the Commission and Its Findings of Fact Are Conclusive

Section 1 of the Interstate Commerce Act was amended by Section 402 of the Transportation Act (41 Stat. 476), which provided by paragraph (12) thereof as follows:

> (12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for

> such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine.

As shortly stated by the District Court, "The question which comes up for decision in this case is whether a joint mine shall be allowed to order such cars as it may need, according to its rated capacity as fixed under the rule, from each railroad, or shall it be allowed only to order such number of cars from both carriers as it would be allowed to order from one carrier" (Tr. 55; 293 Fed. Rep. 462).

The history of mine rating and car distribution may be found in previous reports of the Commission.

R. R. Com. of Ohio et al. v. *M. V. Ry. Co.*, 12 I. C. C. 398.

Powhatan Coal & Coke Co. v. *N. & W. Ry. Co. et al.*, 13 I. C. C. 69.

Royal Coal & Coke Co. et al. v. *Southern Ry. Co.*, 13 I. C. C. 440.

Traer v. *Chicago & Alton Railroad Co. et al.*, 13 I. C. C. 451.

Rail & River Coal Co. v. *B. & O. R. R. Co.*, 14 I. C. C. 86.

Hillsdale Coal & Coke Co. v. *P. R. R. Co.*, 19 I. C. C. 356.

In re Irregularities in Mine Ratings, 25 I. C. C. 286.

Without exception this Court has vigorously sustained the jurisdiction and authority of the Com-

mission over this all-important subject, and if there is any one question above another which the railroad companies, the Commission, the courts, and the entire commercial world had all regarded as conclusively settled, it is that the Interstate Commerce Commission was clothed with power to regulate the distribution of cars to coal mines in times of car shortage and that its orders were final.

> *Interstate Commerce Commission* v. *Illinois Central*, 215 U. S. 452.
>
> *Interstate Commerce Commission* v. *Chicago & Alton*, 215 U. S. 479.
>
> *Baltimore & Ohio* v. *Pitcairn Coal Co.*, 215 U. S. 481.
>
> *Procter & Gamble Co.* v. *United States*, 225 U. S. 282.
>
> *Mitchell Coal & Coke Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247.
>
> *Morrisdale Coal Co.* v. *Pennsylvania Railroad Co.*, 230 U. S. 304.
>
> *Pennsylvania Railroad Co.* v. *Puritan Coal Co.*, 237 U. S. 121.
>
> *Pennsylvania Railroad Co.* v. *Clark Coal Co.*, 238 U. S. 456.
>
> *Pennsylvania Railroad Co.* v. *Stineman Coal Co.*, 242 U. S. 298.
>
> *Loomis* v. *Lehigh Valley Railroad Co.*, 240 U. S. 43.

In its opinion the learned District Court said (Tr. 57; 293 Fed. Rep. 464):

> The facts developed by the evidence show very large expenditures made by the plaintiffs for the purpose of shipping coal by the two

carriers. It is also shown that the shortage of cars on each carrier continues most of the time, and that the right to ship coal by each carrier is a valuable property right. If the right to ship by each carrier, and to receive cars from each carrier, on the basis of rated capacity, is denied to the plaintiffs, and to other shippers in like condition, the financial loss will be very great, and the value of their properties will be greatly depreciated. Much larger prices have been paid for mines which had access to the lines of two carriers than would be thought of for similar mines with access only to the line of one carrier. When there is any real market for coal, car shortage has always existed, and, so far as can be foreseen, will always exist. This case would not have arisen if each carrier had always on hand a sufficient supply of cars to take care of the demands of each shipper.

The shipper of any commodity who has access to more than one carrier has a right to choose one carrier, or to divide his goods among two or more carriers, with the advantages naturally belonging to such location giving such access, and while the Interstate Commerce Commission has, under the law, certain powers of regulation, yet it is beyond such powers to deprive the shipper of such right under the guise of regulation, or to limit such right in such way as to amount to the deprivation thereof. From the adjudged cases, it is plainly to be seen that the Interstate Commerce Commission has no authority to exercise its powers so arbitrarily as virtually to

transcend such authority conferred, although it may be not technically doing so. *Procter & Gamble Co.* v. *United States, supra.*

A so-called regulation, which destroys at least 30 per cent of the market value of a coal property, certainly transcends such authority. It is a taking of private property without due process of law by depriving the owner of the power to use it in a legitimate and proper way, for the commercial purpose for which it was designated and developed, by the large extra expenditures of money as shown by the evidence in this cause. Of course, a commercial advantage will accrue to the joint mine over the local mine by the abrogation of rule 4, but in our opinion that advantage constitutionally belongs to it by reason of its location, and one that the Interstate Commerce Commission can not order the carriers to take away from it, and one of which the carrier can not legally deprive it.

In so holding the learned District Court erred. The doctrine announced by Mr. Justice Holmes in *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46, "The law does not attempt to equalize fortune, opportunities, or abilities," is wholly inapplicable. There the shippers, as owners of certain of the transportation facilities located at convenient points or gateways and who were performing part of the transportation service, were receiving allowances from the carriers. Here the opposite situation prevails. These coals in the earth have fixed and unchangeable locations. They must be discovered and

transportation facilities must be extended thereto before mines may be opened and the coals made useful. In order to produce coal, mine development and transportation facilities must go to that coal however inconveniently located it may be.

The Court takes judicial notice that ordinarily coal is produced in mountainous or rolling regions where mine development and railroad construction are highly costly. Without railroads and transportation facilities, far inland mines are utterly useless. Here we have the announced doctrine by a court of equity that because one coal mine with a daily capacity of 60 cars happens to be located at a point which is served by two or three carriers, it is entitled to twice or three times as many more cars as another mine of the same capacity located but a short distance away on the line of a single carrier.

The learned District Court lost sight of the fact that the production of coal and the distribution thereof is the paramount question. The carrier is not concerned, as in time of car shortage its supply is consumed in any case. Obviously the doctrine announced by the learned District Court would give practically the entire production to those mines which are located on two or more carriers as against other mines whose production is equally important but which are located on the lines of single carriers. As in the instant case, in order to acquire preference and discrimination short lines or spurs need only be constructed to double or triple the car supply of one

mine over another. It is conceivable that many mines are so located as that but one railroad only may be built thereto. Is such a mine to transact business merely on "left over" cars of other mines that may be served by two or more carriers? The doctrine that the "law does not attempt to equalize fortune, opportunities, or abilities" should not deprive a coal mine of its *pro rata* car supply based on its capacity because it happens to be located only on a single railroad. In determining the subject but two elements are to be considered, i. e., the capacities of the respective mines and the number of cars available for all mines according to capacities. The fact that a mine may be served by one carrier or six should not be a test for the distribution of the cars, as it is obvious that a distribution on any such basis would be wholly injust and inequitable.

Directly in point is *Seaboard Air Line Railway* v. *United States*, 254 U. S. 57. In that case this Court held that discrimination in the absorption of switching charges in the Richmond Switching District on cars originating at points served by competitive carriers could not be sustained as against the nonabsorption of such charges on cars originating at noncompetitive points. Holding that the question was foreclosed by the findings of fact of the Commission this Court affirmed the decree of the District Court dismissing the bill. In that case it was held that a shippers hould not be favored because it was locatedat a point which was served by two carriers as against a

shipper located at another point which was served by a single carrier. That case and the instant case are *on all fours.* In that case this Court held that the order of the Commission was final.

On this branch of the case the language of Circuit Judge Woods, dissenting, and the cases cited by him are pertinent: (Tr. 60; 293 Fed. Rep. 467).

> Even, however, if rule 4 had been adopted and put into effect by the Interstate Commerce Commission, it seems to me perfectly clear that this court has no power to change it. It is apparent from the above statement that the Interstate Commerce Commission has devoted much time and care to the consideration of the justness and reasonableness of the rule. To say the least, it can not be doubted that the whole matter is debatable and that there are very strong reasons in favor of rule 4 as distinguished from the 150 per cent rule claimed by the complainants. Even if this court entertains the opinion that the action of the commission was unwise and improper, that affords no ground to say that a prima facie case for an injunction has been made out. (*Interstate Commerce Commission* v. *Illinois Cent. R. R.*, 215 U. S. 452, 478; *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, *Manufacturers' Ry. Co.* v. *United States*, 246 U. S. 457; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 562; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57, 62;

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No. 627.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

THE NEW RIVER COMPANY, WHITE OAK FUEL COMPANY, STUART COLLIERY COMPANY, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

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Of Counsel.

MARCH, 1924.

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In the Supreme Court of the United States

OCTOBER TERM, 1923.

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No. 627.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT OF THE CASE.

INTRODUCTORY.

This is an appeal by the United States and the Interstate Commerce Commission, hereafter referred to as the Commission, from a final decree of the United States District Court for the Southern District of West Virginia.[1] The decree annulled and set aside an order of the Commission which the court held "promulgated and put into effect and authorized a certain rule, known as Rule 4 of Circular CS-31, Revised," relating to the distribution of cars during periods of car shortage, to bituminous

[1] Hon. Charles A. Woods and Hon. Edmund Waddill, Jr., Circuit Judges, and the Hon. George W. McClintic, District Judge, sitting as a special thre -judge court under the provisions of the Urgent Deficiencies Act, October 22, 1913, c. 32; 38 Stat. 208, 219, 220

coal mines, and more particularly to joint mines,[2] by the Chesapeake & Ohio Railway Company and the Virginian Railway Company; and perpetually enjoined the United States, the Commission, and the two railroad companies from "restricting * * * the transportation rights" of appellees, who are operators of certain joint mines, "by or through any other order or rule to the same effect."

Rule 4 reads as follows:

> Copies of orders for cars for a mine that is joint with any other carrier (steam, electric, or water) shall be filed with a designated representative of each such carrier. Such combinations must not exceed the gross daily rating of the mine.

The statement of the case will, perhaps, be somewhat clearer if this rule is explained at the outset. To understand the meaning of the rule, it is necessary to consider the other rules, which, together with Rule 4, provide for the distribution of cars for coal loading when the available supply is not sufficient to meet all requirements. These rules are set forth in full as an appendix to the amended bill. (Rec. p. 19.) Briefly, it may be said that they provide for a *pro rata* distribution each day between mines served by the carrier of the cars available for coal loading on the basis of the "rating" of each mine. The rules provide how the ratings, which are changed each month, shall be calculated. The rating of a local mine for a given month is determined by taking the

[2] A "joint" mine is one served by two or more carriers. A mine served by only one carrier is called a "local" mine.

total tonnage shipped by the mine during the preceding month over the carrier serving it, dividing this tonnage by the number of hours worked in producing it, and multiplying the quotient by the number of hours in the recognized work day of the particular mine. The result is the "daily rating" of the local mine, stated in tons. It is generally reduced to terms of cars by dividing the number of tons by 50, the standard car having a carrying capacity of 50 tons. The daily rating of a local mine over the road which serves it is thus identical with its daily capacity to produce coal. All coal it produces must of necessity be shipped over that road.

The rating of a joint mine is obtained by first determining its daily capacity to produce coal, which is calculated in the way that the daily rating of a local mine is determined, except that in case of a joint mine its shipments over all carriers serving it are considered. The figure thus ascertained is called the "gross daily rating" of the joint mine instead of the "daily rating" in recognition of the fact that it does not represent the capacity of such a mine to ship over each line serving it on days when it uses more than one line, but, on the contrary, represents its total daily capacity to ship over all lines which serve it. The rules provide that when a mine orders less than its rating, cars are to be distributed to it on the basis of its orders; and provide (Rule 4), as we have shown above, that the combined orders of a joint mine for cars from all roads serving it can not exceed the *gross* daily rating of the mine. Thus

Rule 4 in effect provides a flexible "daily rating" for a joint mine *over each carrier which serves it.* The daily rating over each line is dependent upon the daily rating over the other line or lines, and the combined daily ratings are equal to the *gross* daily rating.

An illustration will make this clear. A joint mine, with a *gross* daily rating of 5,000 tons or 100 cars, is served by two railroads "A" and "B." On a given day "A" has cars available for distribution which will meet only 60 per cent of the mine's requirements for that day; "B" has a 40 per cent car supply. The joint mine could order its entire *gross* daily rating, 100 cars, from "A" and receive as its distributive share 60 cars, in which case it could receive no cars from "B"; or it could order 50 cars from "A" and 50 cars from "B," and receive 30 cars from "A" and 20 cars from "B"; or order its entire *gross* daily rating from "B" and receive from "B" 40 cars and no cars from "A."

The car distribution rules we have outlined were established during Federal control. Prior to that time the rules of the various carriers differed widely. After the expiration of the period of Federal control the Commission issued a notice, dated March 2, 1920, to carriers and shippers, in which it recommended that until experience and further study demonstrated that other rules would be more effective and beneficial, the uniform rules established during Federal control be continued in effect. (Rec. p. 36.) These rules were continued in effect by carriers gen-

erally, including the Chesapeake & Ohio and the Virginian. On July 8, 1920, these two carriers asked the Commission for permission to discontinue Rule 4 and substitute for it a rule generally called the 150 per cent rule, which the Commission had found in 1912 to be a reasonable rule for the Illinois Central Railroad Company, *In Re Irregularities in Mine Ratings,* 25 I. C. C. 295, but which had never been followed by the railroads generally, or by the Chesapeake & Ohio or the Virginian. (Rec. pp. 26, 27, 35.)

Under the 150 per cent rule a joint mine is permitted to order 100 per cent of its gross daily rating from either line serving it and to receive, on that basis, its *pro rata* share of that line's available cars. If it does this it is not entitled to any cars from the other lines serving it. In this respect it does not differ from the 100 per cent rule. However, under the 150 per cent rule, when a joint mine, served by two carriers, orders cars from both on the same day, its rating over each road is 75 per cent of its gross daily rating, and its combined ratings over the two lines are 150 per cent of its gross daily rating. The joint mine may obtain its *pro rata* share of cars from each carrier on the basis of 75 per cent of its gross daily rating, subject to the limitation that it can not actually receive from both lines together more than 100 per cent of its gross daily rating.

The Commission declined to give "informally" the permission, which the Chesapeake & Ohio and Virginian had sought, to substitute the 150 per cent rule for the 100 per cent rule.

PROCEEDINGS BEFORE THE COMMISSION.

Thereupon, on January 11, 1921, appellees filed separate complaints with the Commission against the Chesapeake & Ohio and the Virginian attacking Rule 4 as unjust and unreasonable, and unduly prejudicial to joint mines and unduly preferential of local mines. Appellees own and operate 11 coal mines in Fayette and Raleigh Counties, West Virginia, in the so-called New River District. Each of appellees' mines is located on either the Virginian or the Chesapeake & Ohio, but is served by both carriers as a result of certain trackage and other arrangements. (Rec. pp. 28, 29.) There are numerous coal mines in the New River District, other than those of appellees; some are joint mines, others are served only by the Chesapeake & Ohio, and still others are served only by the Virginian.

Appellees' complaints before the Commission were docketed as Nos. 12083 and 12084. Certain operators of local mines in the New River District intervened in support of the reasonableness, etc., of Rule 4. The complaints were consolidated with each other and with still other similar complaints, were assigned to Division 5 of the Commission and duly heard, briefed and argued. On June 21, 1921, Division 5 issued its report, finding (Rec. pp. 25, 31):

> * * * rule 4 of Circular CS–31, Revised, is unreasonable and unduly prejudicial to joint mines and unduly preferential of local mines, to the extent that it limits the aggregate orders of the joint mine to 100 per

> cent of its rating from both roads; and that for the future during periods of car shortage defendants should distribute cars to the joint mines on their lines here considered on the basis outlined in the Illinois Case, namely, on days when the joint mine orders cars from only one carrier it shall have cars based upon its full rating from that carrier, and on days on which it orders cars from both carriers its rating on each of such carriers shall be 75 per cent of its full rating, subject to the limitation that it shall on no day be supplied with cars in excess of its maximum rating, * * *.

It was said in the report: (Rec. p. 32)

> We shall expect * * * that defendants will promptly amend their car service rules so as to conform with our findings * * *.

No order was entered, but the Chesapeake & Ohio and the Virginian amended their rules to conform with the findings in the report. Subsequently, on petition of the operators of local mines who had intervened in Nos. 12083 and 12084, the case was reopened for further argument and was reconsidered by the full Commission, which issued its report, on December 11, 1922 (Rec. p. 32), reversing the former findings of Division 5 in Nos. 12083 and 12084 and finding that Rule 4 was not unreasonable or unduly prejudicial. On the same day the Commission entered an order dismissing the complaints in Nos. 12083 and 12084, this being the first order to be

entered in the proceeding. We quote the order, omitting the formal parts: (Rec. p. 43)

> These cases being at issue upon complaints, answers, and intervening petitions on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:
>
> *It is ordered*, That the complaints in these proceedings be, and they are hereby, dismissed.

In its report upon reargument, the Commission said in part (Rec. pp. 40, 41):

> Upon the present record and in the light of instant conditions we are not disposed to extend the principle laid down in the *Illinois case*, which was intended as a limitation upon the practice of the respondent in that proceeding. Ten years have elapsed since our decision in that case, and we now have a considerable experience with the results of the practice inaugurated by the carriers following our determination, as well as a broader record. We have indicated in proceedings of this character that the principle of *stare decisis* has no application, and that our determinations as to what will for the future be just and reasonable must meet changed conditions and wider knowledge, as developed by the passage of time. (*Hillside Coal & Coke Co.* v. *P. R. C. Co.*, 19 I. C. C. 356, 361.)

Indeed, in passing upon the mine-rating feature of the *Illinois case*, we indicated in the report at page 295, that we did so only upon the facts and under the conditions there presented, and that our determination in approving the basis presented was not to be understood as indicating approval of its adoption in places where it would not suitably and properly meet the conditions, or where it would be objectionable to the great majority of those affected thereby. In important particulars the present record presents new aspects to us. There have been important developments in the coal industry, not then in contemplation. The superior advantages of the joint mine over its local competitor, in part flowing from the decision in the *Illinois case*, have resulted in a proportionately greater development of the industry at points where mines may be served by two or more carriers rather than by but one. A duplication of trackage and of trackage rights has followed in numerous instances. The practice indicated in the *Illinois case* seems, in certain instances, to result in a waste of car-days which in view of the effects of recent and present car shortages should be avoided. There has been extreme dissatisfaction in the ranks of mine labor, accentuated, in any event, by inequalities in opportunities for working time and wages. The results of such disturbed labor conditions have been harmful to the carriers and to shippers. Whatever tends to inflate the nominal mine ratings beyond the amount which can normally be produced and shipped is distinctly counter to the public interest.

Following the report and order of the Commission upon reargument the Chesapeake & Ohio notified appellees that it would again put Rule 4 into effect on February 10, 1923; and the Virginian served notice that it would take similar action on February 1, 1923.

PROCEEDINGS IN THE DISTRICT COURT.

After receiving these notices that the carriers proposed to reinstate Rule 4, appellees filed their bill of complaint in the District Court. The bill was later amended and since we are concerned only with the bill as amended, we will refer to it as the "bill." The United States, the Commission, the Chesapeake & Ohio and the Virginian were named as defendants. It was prayed that the "decision, ruling and order of December 11, 1922" of the Commission be set aside and annulled and that the United States, the Commission, and the defendant carriers be enjoined from enforcing or applying Rule 4, and from restricting transportation service to appellees by any similar rule. (Rec. pp. 1, 18.)

The bill does not allege that appellees had been denied a fair hearing, or that the procedure before the Commission was irregular, or that the Commission's action was not supported by the evidence. The ground upon which the Commission's action is challenged seems to be that Rule 4 deprives appellees of their "legal rights" to obtain a fair share of available cars. Paragraph XXI of the bill reads as follows: (Rec. p. 14).

> Said decision, ruling, and order of the Interstate Commerce Commission of De-

cember 11, 1922, and said Rule 4 put into effect by the defendant carriers in compliance therewith, constitutes an encroachment upon and a curtailment and denial of the legal right of your complainants and each of them to the service of a common carrier in interstate commerce on a parity with other shippers offering similar shipments to said carrier and of the carrier's legal duty and legal and property rights as a common carrier to serve your complainants as such common carrier and deprives your complainants, and each of them, of their property and legal rights without due process of law and of the equal protection of the laws assured by the constitutions and laws of Virginia, of West Virginia, and of the United States.

and it is said in paragraph XXVI: (Rec. p. 16)

It is a common law, statutory and property right of each of your complainants to have goods which it desires to have shipped by a common carrier in interstate commerce accepted and received for transportation without discrimination as to transportation and car supply between it and other shippers desiring to have similar goods shipped by the same carrier and there is a reciprocal legal duty and obligation on the carrier, regardless of what shipments the shipper may have made of other goods over another competing road, to receive and ship the goods offered by a shipper on a parity with other parties so offering goods to it for shipment and without discrimination between parties so tendering

> such shipments; if your complainants are deprived of the transportation rights to which they are entitled their investments and property in the mines owned by them and which are dependent on such transportation will be lost or seriously impaired.

The bill also alleges that the Commission's action is invalid in that it authorizes and requires the defendant carriers to agree and act in combination one with the other in furnishing transportation to a joint mine, in violation of the laws against the restraint of trade; and alleges further that the Commission's action is invalid in that it will result in a discrimination between shippers of coal served by two carriers, and shippers of other commodities similarly served, because shippers of such other commodities "enjoy the right" to ship over each carrier on a parity with other shippers offering similar commodities for shipment to that carrier regardless of shipments which they have made over the other carrier. (Rec. p. 15.)

The United States filed motions to dismiss the bill, alleging as grounds: (1) that the Commission's order was negative and therefore the court was without jurisdiction to review it, and (2) that the bill was wanting in equity. (Rec. pp. 44, 45.) The Commission filed a motion to dismiss, alleging like grounds. (Rec. p. 46.) The Chesapeake & Ohio and the Virginian filed answers to the bill. However, these defendants did not join in this appeal and their answers are not included in the record. The Slab

Fork Coal Company and numerous other companies, which operate local mines in the New River District, served by the Chesapeake & Ohio or the Virginian, and which had been intervening parties in the proceedings before the Commission, intervened, filed a motion to dismiss, and later filed an answer. These companies have perfected a separate appeal and the record in that appeal includes their pleadings. This record does not.

On January 28, 1923, a temporary restraining order was entered. (Rec. pp. 47, 48.) On March 20, 1923, the cause came on for final hearing and on August 10, 1923, the district court, Judge Woods dissenting, entered its final order and decree which reads, in part, as follows: (Rec. pp. 50, 52)

> It is ordered, adjudged and decreed as follows:
>
> 1. That the order of December 11, 1922, of the Interstate Commerce Commission, whereby rule 4 of Circular CS–31, revised, is promulgated and put into effect and authorized is without warrant in law and is null and void.
>
> 2. That said order and said rule 4 of Circular CS–31, revised, promulgated, and authorized thereby are hereby set aside and annulled.
>
> 3. That the United States of America, the Interstate Commerce Commission and the carriers defendant herein, and each of them, are perpetually restrained and enjoined from restricting, in accordance with said order of December 11, 1922, of the Interstate Commerce Commission, and of rule 4 of Circular

CS–31, revised, thereby promulgated and put into effect and authorized, the transportation rights in interstate commerce of the complainants and from so restricting said service by or through any other order or rule to the same effect.

An opinion was filed, from which we quote (Rec. p. 57):

> The shipper of any commodity who has access to more than one carrier, has a right to choose one carrier, or to divide his goods among 2 or more carriers, with the advantages naturally belonging to such location, giving such access; and while the Interstate Commerce Commission has, under the law, certain powers of regulation, yet it is beyond such powers to deprive the shipper of such right, under the guise of regulation, or to limit such right in such way as to amount to the deprivation thereof.
>
> From the adjudged cases, it is plainly to be seen, that the Interstate Commerce Commission has no authority to so exercise its powers so arbitrarily as virtually to transcend such authority conferred, although it may be not technically doing so.
>
> *Procter & Gamble Co.* v. *United States, supra.*
>
> A so-called regulation which destroys at least thirty per cent of the market value of a coal property, certainly transcends such authority. It is a taking of private property without due process of law, by depriving the owner of the power to use it in a legitimate and proper way, for the commercial purpose

> for which it was designed and developed, by the large extra expenditures of money as shown by the evidence in this cause.

The court did not say what rule of car distribution would meet the requirements of the law or what the requirements of the law were, except in so far as they are set forth in the language quoted above. Judge Woods filed a dissenting opinion. (Rec. p. 59.)

The United States and the Commission announced that they would stand on their motions to dismiss, and took a direct appeal to this court.

ASSIGNMENTS OF ERROR

The assignments of error are, in effect, that the court erred in holding that the Commission's action was affirmative and subject to review; and in holding that the Commission was without power to require the carriers to establish rule 4. (Rec. p. 62.)

ARGUMENT.

1. THE COMMISSION DID NOT GRANT AFFIRMATIVE RELIEF, AND ITS ACTION, THEREFORE, IS NOT SUBJECT TO REVIEW.

If the Commission denies affirmative relief sought, and does not base such denial upon a mistaken view that it has no jurisdiction to grant the relief, there can be no judicial review of the Commission's action. *Procter & Gamble* v. *United States,* 225 U. S. 282; *Hooker* v. *Knapp,* 225 U. S. 302; *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412; *B. & O. R. R. Co. et al.* v. *United States et al.,* decided by this court March 3, 1924. The court will not inter-

fere and grant the relief which the Commission, in the exercise of its jurisdiction, has denied.

On July 11, 1921, when appellees filed their complaints before the Commission, Rule 4 was in force on the Chesapeake & Ohio and the Virginian. Division 5 of the Commission found that Rule 4 was unreasonable and discriminatory, found that the 150 per cent rule was a reasonable rule, and stated that defendants would be expected to conform their rules to the findings. No order was entered at that time. The railway companies amended their rules by substituting the 150 per cent rule for Rule 4. Upon petition of the local mines, who were parties by intervention, the case was reopened for further argument, after which the full Commission reversed the decision of Division 5, and found that Rule 4 was not unreasonable or unduly prejudicial. The Commission then entered an order, the first which was entered during the course of the proceeding, dismissing the complaints which appellees had brought attacking the reasonableness of Rule 4.

Speaking of this feature of the case, Judge Woods said in his dissenting opinion (Rec. p. 60):

> There was never any order or even final determination of the Commission to put into effect any rule or to interfere with rule 4 of the railroads. The conclusions announced in its opinion were reopened, reconsidered, and changed; but all this was done in one consolidated proceeding, which was never ended until the Commission made the order above quoted. This last order was a final dismissal

> of the complaints and a refusal to take any action with respect to rule 4 of the railroads. It was, therefore, a negative order—a mere refusal to interfere with an existing rule. As such it was not reviewable by this court.

We submit that the conclusion thus expressed by Judge Woods is sound.

II. WHAT IS A FAIR AND JUST DISTRIBUTION OF CARS BETWEEN MINES, WHEN THE AVAILABLE SUPPLY IS NOT SUFFICIENT TO MEET ALL REQUIREMENTS, IS A QUESTION FOR THE ADMINISTRATIVE DISCRETION OF THE COMMISSION.

It is clear that a joint mine, and a local mine as well, has a statutory right to a fair share of the available cars in times of car shortage; but the law does not prescribe the rules which shall govern the distribution. The statute does not furnish a certain answer to the question: How many cars is a given mine entitled to on a given day under given circumstances? The answer must be supplied by the Commission. A similar situation is presented in respect of rates. The law requires that rates be reasonable, but it is for the Commission to determine what is a reasonable rate, subject only to the well-known limitations which will be referred to later.

(a) The provisions of the statute.

The authority of the Commission over car distribution is to be found in the following provisions of the Interstate Commerce Act:

> Section 3(1). * * * it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any

> undue or unreasonable preference or advantage to any particular person, * * * or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, * * * or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.
>
> Section 15 (1). * * * whenever, after full hearing, * * * the Commission shall be of opinion that * * * any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe * * * what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, * * * and shall conform to and observe the regulation or practice so prescribed.

The provisions above quoted are sufficient in themselves to give the Commission jurisdiction to determine whether a scheme of car distribution is unlawfully discriminatory and to fix a just and fair method of distribution to be followed in the future. This

court has so held in a long line of cases which will be discussed later.

There are, however, other provisions of the statute which bear upon the Commission's authority over car distribution, and these are set out below to show how complete is the control of this subject which Congress gave to the Commission:

> Section 1(3). * * * The term "transportation" as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, * * *.
>
> Section 1(4). It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor. * * *.
>
> Section 1(6). It is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce * * * just and reasonable regulations and practices affecting * * * the facilities for transportation, * * * and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

Section 1(10). The term "car service" in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act.

Section 1 (11). It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

Section 1 (12). It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine.

Section 1 (14). The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect

to car service by carriers by railroad subject to this Act, * * *.

See also section 1 (15), (16), (17), relating to the Commission's emergency powers over car service. These provisions have no direct bearing upon this case, but they serve as another indication of the character of control which Congress intended that the Commission should exercise over car service.

(b) This court has repeatedly upheld and explained the Commission's exclusive jurisdiction over the allotment of cars during periods of car shortage.

The Commission's exclusive jurisdiction over the allotment of cars in times of car shortage has been upheld and explained by this court in many decisions.

In *Morrisdale Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 304, the coal company sought, by suit in a circuit court of the United States, to recover damages from the railroad company for an alleged violation of section 3 of the Act to Regulate Commerce, growing out of the distribution of coal cars to mines. The coal company claimed that the rules in effect were unjust and discriminatory as against it in so far as they provided that private cars and railroad fuel cars would not be considered as a part of the available car supply for purposes of determining the daily allotment of cars to which each mine was entitled. A private coal car is a car owned by a shipper or receiver of coal. The coal company had not obtained a ruling from the Commission as to the reasonableness of the method of distribution to which it objected.

The court stated the law very plainly, at pages 312–313:

> The prohibitions of section 3 of the Commerce Act require that cars shall be fairly allotted to shippers without unjust discrimination or unfair preference. But the statute does not define what is the proper method of distribution in case of car shortage, * * *.
>
> * * * the question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Commission. It was distinctly so ruled in the Pitcairn Case, 215 U. S. 481, and in *I. C. C.* v. *Illinois Central*, 215 U. S. 452. Those cases involve a consideration of the power of the Commission over the distribution of cars and held that the courts could not by mandamus compel it to make a rule, nor by injunction restrain the enforcement of one it had promulgated. If in those direct proceedings the courts could not pass upon the question of reasonableness of a method of allotting cars neither can it do so as an incident to an action for damages.

In *Interstate Commerce Commission* v. *Illinois Central R. R.*, 215 U. S. 452, the railroad company attempted to set aside an order of the Commission prescribing certain car distribution rules which required that railroad fuel cars should be counted against the mines receiving them, that is to say, that such cars should be considered as a part of the

available car supply, with certain modifications not here important. The railroad claimed that it was beyond the power of the Commission to establish such rules; that the rules would result in discrimination against the mines from which the railroad companies purchased their coal and in other discriminations. The court upheld the power of the Commission and stated that the contentions of the railroad inveighed

> against the expediency of the order;

that they simply assailed

> the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body * * *, or attack as crude or inexpedient the action of the Commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils.

the court said further

> At best these arguments but suggest the complexity of the subject, and the difficulty involved in making any order which may not be amenable to the criticism that it leads to or may beget some inequality.

Baltimore & Ohio R. R. v. *Pitcairn Coal Co.*, 215 U. S., 481. The coal company brought suit in a United States Circuit Court charging that the method followed by the railroad company in distributing its cars in time of car shortage was unfair and discriminatory against the coal company, and praying that the railroad be required for the future to follow certain

rules which were alleged to be fair and in keeping with the rights of the coal company. The rules against which complaint was directed provided that, in rating mines, there should be considered first, the physical capacity of the mines and, second, the previous shipments by the mines during a two-year period,

> the capacity counting as one and the previous shipments as two.

The previous shipments were to be taken from the records of the railroad company during periods when there was no car shortage. After the mines were rated in this manner, certain deductions were made out of the mass of cars before distribution and certain arbitrary allowances were also made. New mines were allotted an arbitrary number of cars for development; railway fuel cars and private cars were deducted. An arbitrary number of cars were assigned to mines on fire, and mines in the vicinity of industries were given special treatment. The rules contained a provision which related to joint mines and provided that the ratings of such mines should be reduced by 50 per cent. It will be seen that this provision limited the allotment of cars by the Baltimore & Ohio to a mine served by another railroad in a much more drastic way than Rule 4 limits the allotment of cars to a joint mine by each carrier serving that mine. The court held that it was not within the power of the court to decide whether or not the car distribution rules described were fair or to prescribe rules for the future; that

the fixing of such rules called for the exercise of administrative discretion by the Commission. The rule relating to joint mines was not particularly discussed.

In *Penna. R. R.* v. *Clark Coal Co.*, 238 U. S., 456, it was said, at pages 468–469:

> The question whether the rule or method of car distribution practiced by the railroad company was unjustly discriminatory was one which the Commission had authority to pass upon. *Inter. Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452; *Same* v. *Chicago &c. R. R.*, 215 U. S. 479; *Morrisdale Coal Co.* v. *Penna. R. R.* 230 U. S. 304, 313; *Penna. R. R.* v. *Puritan Coal Co.*, 237 U. S. 121, 131.

See also *Penna. R. R.* v. *Puritan Coal Co.*, 237 U. S. 121; *Pennsylvania R. R.* v. *Sonman Coal Co.*, 242 U. S. 121; *Pennsylvania R. R. Co.* v. *Stineman Coal Co.*, 242 U. S. 298; *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247.

(c) The question here presented is not different in character from those presented in cases discussed above; it is an administrative question.

Appellees' claim, as we understand it from their position in the lower court, is that a joint mine has a right as a matter of law, which the Commission can not alter, to obtain cars in accordance with the following rule, or one which would deal even more liberally with them. From one road the joint mine, which we will assume is served by only two railroads, can obtain cars based on its gross daily rating or capacity to produce coal, and from the other line it

can obtain cars on the basis of its gross daily rating minus the tonnage shipped via the first road. We will call this "appellees' rule" for want of a better name. So far as we can learn from reported cases it has never been in effect on any line of railroad.

Appellees' rule is unworkable; it is impossible of practical application. An illustration will make this apparent and also serve to show how complex and essentially administrative are the questions presented in connection with car distribution. Railroad A serves four mines, Nos. 1, 2, 3, and 4. Nos. 1 and 2 are joint mines also served by railroad B; Nos. 3 and 4 are local mines served only by railroad A. Railroad B serves four mines, Nos. 1 and 2, the joint mines served also by railroad A, and Nos. 5 and 6, which are local mines served only by railroad B. Each of the joint mines has a gross daily rating of 100 cars. Each of the local mines has a daily rating of 100 cars.

On a given day railroad A and railroad B each have 200 cars available for distribution. Under the rule which appellees say they are entitled to as a matter of law, a joint mine may order its gross daily rating from one road, either one it chooses, and receive from that road its *pro rata* share of available cars on that basis; and then order from the second road the difference between its gross daily rating and the number of cars it received from the first road, and receive its *pro rata* share of available cars from the second road on the basis of such order. Assume that joint mine No. 1 orders its full gross daily rating from railroad

A and also desires to obtain its *pro rata* share of cars from railroad B; and that joint mine No. 2 orders its full gross daily rating from railroad B and desires also to obtain its *pro rata* share of cars from railroad A. How would the cars be distributed under the rule; what would be the number of cars to which each mine, local and joint, would be entitled?

An attempt to answer the question discloses surprising difficulties. The number of cars which joint mine No. 1 is entitled to receive from railroad A is dependent upon the number of cars which joint mine No. 2 is entitled to order from railroad A; the number of cars which joint mine No. 2 is entitled to order from railroad A depends in turn upon the number of cars which it is entitled to receive from railroad B; the number of cars which joint mine No. 2 is entitled to receive from railroad B depends, however, upon the number of cars which joint mine No. 1 is entitled to order from railroad B, and this depends, as we have seen, upon the number of cars which joint mine No. 1 is entitled to receive from railroad A. This brings us completely around the circle and back to where we started. The same difficulties are encountered in trying to ascertain the distributive shares to which the local mines are entitled because these are dependent upon the shares of the joint mines. An effort to apply the rule to the very simple state of facts we have assumed will make it manifest that its application to actual conditions would be impossible from a practical point of view if not from a theoretical one as well. A railroad may have a hundred or more

mines on its line instead of the four we have assumed; the joint mines served by it may be served by two or more additional carriers instead of one as we have assumed.

If, as is claimed, any rule under which a joint mine would receive fewer cars than under appellees' rule would give to such mine less than the fair share of cars to which it is entitled by law, it would necessarily follow that any rule which would give a joint mine more cars than it would receive under appellees' rule would give a local mine less than the fair share of cars to which it is entitled under the law. The effect of the argument is, therefore, that the law furnishes a certain and definite answer to the question: How many cars is a mine entitled to on a given day, under given circumstances, when the available supply is not sufficient to meet all needs? In other words, a rule, which we have seen can not be applied to actual conditions, is fixed by law and there is no question for the Commission.

But it should be remembered that appellees themselves appealed to the Commission, claiming that Rule 4 was unreasonable and seeking the establishment of what they deemed a reasonable rule. If the subject matter is not within the jurisdiction of the Commission, appellees should have gone to the courts in the first place to enforce their rights and not to the Commission.

The question here is not different in character from the questions which this court held were admin-

istrative questions for the Commission in the *Morrisdale, Illinois Central,* and *Pitcairn* cases, *supra.*

In the *Morrisdale* and *Illinois Central* cases, the question was whether, in distributing cars between mines, private cars and railway fuel cars should be counted against the *pro rata* shares of the mines receiving them and if so, to what extent. Stated another way, the question was whether cars of this character should be treated as a part of the general mass of cars available for distribution; or whether, on the other hand, such cars had a special status in this respect, and if so what that status was. The court held, in effect, that this was not a general question of law for the courts, but was a question for the Commission.

In the *Pitcairn* case it appeared that the mines were rated not alone upon present capacity to produce coal but that past shipments over the Baltimore & Ohio during a two-year period were also considered and given a weight of two as against a weight of one given to present capacity. The court held that it was for the Commission to say whether this was a fair way to rate mines. Certainly, if a mine has no right, which is not subject to the administrative discretion of the Commission, to obtain cars on the basis of its present capacity to produce coal, our case raises no question which is not administrative.

In this connection, it should be pointed out that appellees' position necessarily is predicated upon the proposition, shown to be unsound by the *Pitcairn* case, that joint mines must, as a matter of law, be rated

on their capacity to produce coal. This becomes apparent when it is understood that if a joint mine is given an individual rating over each line which serves it, based on its shipments over that line during an extended period of free car supply, it will receive, during a car shortage period, even if it is given a *pro rata* share of cars by each road based upon 100 per cent of its rating over that road, fewer cars than appellees say it is entitled to receive as a matter of law, and fewer cars than it would receive under Rule 4. An example will make this clear. A joint mine has a capacity, which has remained uniform for two years, to produce 100 cars of coal per day. It is served by two railroads A and B. During the two years its combined shipments over the two roads could not have exceeded 100 cars per day. Assume that it divided its shipments equally between the two roads during the two years. It would then have a rating over each of 50 cars per day. Its combined rating would be 100 per cent of its capacity to ship or the same as the combined or gross rating of a joint mine under Rule 4. It would not, however, be able to obtain cars from one road or the other, at its choice, upon the basis of its combined ratings as it may do under Rule 4. Rule 4 is the more liberal rule.

There are many cases which do not involve car distribution rules but which, nevertheless, are important as indicating the character of questions which call for the exercise of discretion by the Commission

and fall within its exclusive jurisdiction. We will refer to only two such cases.

Loomis v. *Lehigh Valley R. R.*, 240 U. S. 43. A shipper ordered cars from the railroad suitable for the transportation of grain in bulk. He was furnished cars which were inadequate for the required service until fitted with inside doors, and he was therefore compelled to construct the doors himself at a considerable expense. Without resort to the Commission he brought suit in a state court to recover from the railroad the money thus expended. This court held that the question was an administrative one and should have been submitted to the Commission.

Director General v. *Viscose Co.*, 254 U. S. 498. The carrier, having transported silk as freight for many years, amended its tariffs to include silk among articles "that will not be accepted for shipment." The Viscose Company, a manufacturer of silk, filed a bill in a district court of the United States in an effort to enjoin the carrier from refusing to accept its silk for transportation. This court held that the question should have been presented to the Commission.

(d) Sections 22 and 23 are not applicable.

The bill refers to sections 22 and 23 of the Interstate Commerce Act. (Rec. p. 6.) But the provisions of those sections do not detract from what we have said and have no bearing on this case.

Section 22 provides that:

> * * * nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

Section 23 provides that the circuit and district courts of the United States may, under stated conditions, issue a writ of mandamus requiring a common carrier to transport traffic or furnish cars to the person seeking the writ, upon terms as favorable as those given for like traffic under similar circumstances to any other shipper.

In *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S., 426, and the numerous cases which have followed the *Abilene Case*, it was held, after the most elaborate consideration, that section 22 did not have the effect of preserving remedies which were repugnant to the scheme of regulation set up by the statute in that they required courts and juries to pass upon administrative questions confided by Congress to the Commission.

The true meaning of section 23 is clearly explained in *Balt. & Ohio R. R.* v. *Pitcairn Coal Co.*, 215 U. S., 481. We quote from page 499:

> * * * This conclusion being in reason impossible, it must follow that, construing the provisions of section 23 in the light of and in harmony with the amendments adopted in 1906, the remedy afforded by that section, in the cases which it embraces, must be limited either to the performance of duties which are

so plain and so independent of previous administrative action of the commission as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to orders of the commission, rendered within the lawful scope of its authority, until such orders are set aside by the commission or enjoined by the courts.

III. THE COMMISSION'S ACTION WAS NOT ARBITRARY.

When the Commission acts within its legitimate field the courts will not review the wisdom or expediency of its conclusions, or substitute their judgment for that of the Commission. The power to make the order and the wisdom of making it are not to be confused.

Interstate Commerce Commission v. *Illinois Central Railroad*, 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific Railroad*, 222 U. S. 541, 547; *United States* v. *Louisville & Nashville Railroad*, 235 U. S. 314, 320; *O'Keefe* v. *United States*, 240 U. S. 294, 303; *Seaboard Air Line Railway Co.* v. *United States*, 254 U. S. 57, 62; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457.

Of course the Commission's procedure must be such as to insure a fair hearing; its order must be supported by evidence, and must not be so unreasonable and arbitrary as virtually to transcend its statutory authority. Here no claim is made that the procedure was irregular or that the evidence was

insufficient. Furthermore, if any claim is made that the Commission's action was arbitrary, such claim goes back for its chief, if not its only, support to the contention that the Commission's action resulted in an encroachment upon the "legal rights" of appellees. This we have already answered.

Rule 4 is not arbitrary or unreasonable; on the contrary, it is manifestly fair. The gross daily rating of a joint mine is its capacity to ship over all railroads which serve it. The effect of Rule 4 is to provide an elastic and flexible daily rating for the joint mine over each of the roads. The joint mine may itself fix its daily rating over each road, subject only to the restriction that the combined daily ratings can not exceed its gross rating or daily capacity to produce coal.

Under this rule a joint mine may, in case of car shortage, select the railroad which has the better car supply and receive its *pro rata* share of cars from that line on the basis of its full gross daily rating. If first one road and then another has the better supply, the joint mine may switch its orders accordingly, and thus obtain a better supply of cars, on the whole, than can be obtained by a local mine on any line serving it. Furthermore, it may choose between the carriers for the purpose of avoiding embargoes and congestions of traffic on particular roads. Still further, it has available a more extensive and more varied market for its coal and may at times be able to dispose of its product upon the second line of rail-

road, while the mine local to the first road is unable to market its output.

Rule 4, therefore, does not deprive a joint mine of any of the rights enumerated by the district court as follows (Rec. p. 57):

> The shipper of any commodity who has access to more than one carrier, has a right to choose one carrier, or to divide his goods among two or more carriers, with the advantages naturally belonging to such location, giving such access; * * *.

A rule which would permit a joint mine to obtain cars, in times of car shortage, based on a theoretical tender of more cars than it can produce during the day, involves a duplication of tender. A shipper can not claim a right to tender his goods to two carriers at the same time and obtain cars from each on the basis of such tender. A day is the unit of time used for purposes of car distribution. A joint mine should not be permitted to obtain cars from one railroad on the assumption that it can ship all of its day's output over that line when, as a matter of fact, it ships a large part of the day's output over another line.

It was argued below that Rule 4 required a carrier, serving a joint mine, to discriminate against it because the mine transacted business with a competing carrier. And, to show that this was unlawful, the well known line of cases was cited holding that a carrier can not, as a competitive measure, penalize a man who has used another carrier by refusing to meet his just

demands for service. These cases are not in point; they do not bear upon the question of how much service a shipper is entitled to when all requirements can not be met; and still less do they bear upon any question concerning the power of the Commission to make reasonable rules for the distribution of cars which, after all, is the question in this case.

IV. ANSWERING CERTAIN OTHER POINTS SUGGESTED IN THE BILL.

(a) The bill alleges (Rec. p. 14) that Rule 4 is discriminatory against joint coal mines in favor of shippers of other commodities who are served by two or more railroads. This is alleged as a conclusion of the pleader. There is no definite allegation of what method is followed in distributing cars to such other shippers; no allegation that the method, whatever it may be, in any way affects the cars available for distribution to coal mines; no allegation that conditions surrounding the transportation of other commodities, or any of them, are similar to those surrounding the transportation of coal, or are such as to make definite rules for car distribution either necessary or practicable; no allegation that the alleged discrimination has been the subject of complaint to the Commission which surely is the body to pass upon such a question of alleged discrimination, at least in the first instance.

(b) The bill alleges (Rec. p. 15) that Rule 4 requires two competing carriers to act in combination one with the other in restraint of trade and commerce and in

violation of the laws of the United States. We think the rule clearly does not require any such combination. Its only requirement, in this respect, is that one road, in measuring the amount of service to which a joint mine is entitled from it, when its facilities are not sufficient to meet all requirements, shall not only take into consideration the capacity of the mine to produce coal, but shall also consider, in the manner specified, the fact that the mine is not dependent solely upon it for the transportation of the coal which it can produce. The 150 per cent rule and the rule which appellees say is required by operation of law both demand a similar "combination," if the word can be used in this sense, between carriers serving joint mines.

CONCLUSION.

It may be assumed, for purposes of illustration, if indeed the court cannot take judicial notice of the fact, that some mines are served by three, four, or even five carriers. Certain shippers of other commodities are served by perhaps as many as fifteen carriers. Does the law require that during periods when there is an extreme shortage of transportation facilities, such shippers be permitted to obtain all, or practically all, the transportation they desire and thus greatly decrease the already insufficient facilities available for other shippers? Is the Commission powerless to exercise any discretion in such a situation?

We submit that the district court should be reversed and the case remanded with instructions that the injunction be dissolved and the bill dismissed.

J. CARTER FORT,
For the Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

MARCH, 1924.

○

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 628

SLAB FORK COAL COMPANY, SCOTIA COAL & COKE COMPANY, SOUTH SIDE COMPANY, ET AL., APPELLANTS,

vs.

NEW RIVER COMPANY, WHITE OAK FUEL COMPANY, STUART COLLIERY COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

FILED NOVEMBER 4, 1923.

(29,928)

(29,938)

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[fol. 1] IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

In Equity

THE NEW RIVER COMPANY, a Corporation; WHITE OAK FUEL Company, a Corporation; Stuart Colliery Company, a Corporation; Dunnloop Coal & Coke Company, a Corporation; Beckley Coal & Coke Company, a Corporation; Mabscott Coal & Coke Company, a Corporation; Cranberry Fuel Company, a Corporation, Plaintiffs,

versus

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation; The Virginian Railway Company, a Corporation, and The United States of America and The Interstate Commerce Commission, Defendants, and Slab Fork Coal Company, a Corporation; Scotia Coal & Coke Company, a Corporation; South Side Company, a Corporation; Turkey Knob Coal Company, a Corporation; Coal Run Coal Company, a Corporation; Branch Coal Company, a Corporation; Beechwood Coal and Coke Company, a Corporation; Greenwood Coal Cmpany; a Corporation; Laurel Creek Coal Company, a Corporation; Quinnimont Coal Company, a Corporation; Maryland-New River Coal Company, a Corporation; Star Coal & Coke Company, a Corporation; Ephriam Creek Coal & Coke Company, a Corporation, and Stover Coal Company, a Corporation, Intervening Defendants.

TRANSCRIPT OF THE RECORD

James W. Carmalt, Esq., A. G. Guthein, Esq., A. C. Burnham, Esq., and C. W. Dillon, Esq., for complainants and appellees; and George T. Bell, Esq., for intervening defendants and appellants.

Be it remembered that heretofore, to wit: On the 29th day of January, A. D., 1923, came the complainants by their solicitors and filed in the office of the Clerk of the District Court of the United States for the Southern District of West Virginia, at Charleston, their bill of complaint, and the said bill of complaint having later been amended, by leave of the Court, the said bill of complaint as amended, etc., is in the words and figures as follows:

[fol. 2] IN THE DISTRICT COURT OF UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

BILL OF COMPLAINT AS AMENDED—Filed Jan. 29, 1923

To the Honorable the Judges of the District Court of the United States for the Southern District of West Virginia, sitting in equity:

I. Your complainants, The New River Company, White Oak Fuel Company, Stuart Colliery Company, Dunnloop Coal & Coke Com-[fol. 3] pany, Beckley Coal & Coke Company, Mabscott Coal & Coke Company, Cranberry Fuel Company, all West Virginia corporations, bring this proceeding in equity against The Chesapeake and Ohio Railway Company, a corporation, and The Virginian Railway Company, a corporation, for the purpose of enjoining, preventing and restraining them from applying a certain rule for distributing coal cars at the mines of your complainants and others similarly circumstanced, known as Rule 4 of Circular CS-31 Revised, in violation of their common law obligation as common carriers to furnish transportation in interstate commerce upon terms and conditions as favorable as those given by said common carriers, and each of them, for like traffic under similar conditions to other shippers and of the same obligation as defined in the Interstate Commerce Act, approved February 4, 1887 (24 Stat. L. 379), as amended, including the amendments to said Interstate Commerce Act contained in the Transportation Act, 1220, approved February 28, 1920 (41 Stat. L. 456).

And against the United States and the Interstate Commerce Commission to enjoin, set aside and annul the decision, ruling and order of the Interstate Commerce Commission issued under date of December 11, 1922, in proceedings brought by your complainants and designated as New River Company, et al., vs. The Chesapeake and Ohio Railway Company, Interstate Commerce Commission Docket No. 12083, and New River Company, et al., vs. The Virginian Railway Company, Interstate Commerce Commission Docket No. 12084, and the order of the Interstate Commerce Commission issued under date of April 15, 1920, upon the Commission's own motion in the regulation of car service in so far as said decisions, rulings and orders of the Interstate Commerce Commission authorize or require the said carriers, defendant herein, to publish and apply the rule [fol. 4] of car distribution aforesaid, which said decisions, rulings and orders of the Interstate Commerce Commission were and are in excess of its statutory powers and were and are arbitrary and without warrant of law and, therefore, void.

And in support hereof your complainants allege and show:

II. Your complainant, The New River Company, is a corporation of the State of West Virginia which controls, by stock ownership

of all of the stock, the other corporations herein joined with it as complainants, to-wit:

White Oak Fuel Company, a corporation of the State of West Virginia, operating bituminous coal mines within the said State, known as Scarbro, Whipple and Oakwood, which said mines are served severally by each of said carriers defendant herein in the transportation of goods, including coal and coke, in interstate commerce;

Stuart Colliery Company, a corporation of the State of West Virginia, operating bituminous coal mines within said State, known as Summerlee and Lochgelly, which said mines are served severally by each of said carriers defendant herein in the transportation of goods, including coal and coke in interstate commerce;

Dunnloop Coal & Coke Company, a corporation of the State of West Virginia, operating a bituminous coal mine within the said State, known as Dunnloop, which said mine is served severally by each of said carriers defendant herein in the transportation of goods, including coal and coke, in interstate commerce;

Beckley Coal & Coke Company, a corporation of the State of West Virginia, operating a bituminous coal mine within said State, [fol. 5)] known as Beckley, which said mine is served severally by each of said carriers defendant herein in the transportation of goods, including coal and coke, in interstate commerce;

Mabscott Coal & Coke Company, a corporation of the State of West Virginia, operating a bituminous coal mine within said State, known as Mabscott, which said mine is served severally by each of said carriers defendant herein the transportation of goods, including coal and coke, in interstate commerce;

And Cranberry Fuel Company, a corporation of the State of West Virginia, operating three bituminous coal mines within said State, known as Cranberry No. 1, Cranberry No. 2 and Cranberry No. 3, all in the State of West Virginia, which said mines are each of them served severally by each of the carriers defendant herein in the transportation of goods, including coal and coke, in interstate commerce.

III. The Chesapeake and Ohio Railway Company, defendant herein, is a corporation of the State of Virginia, having its usual place of business in the State of West Virginia, engaged as a common carrier in the transportation of passengers and property, including coal, wholly by railroad between points in the State of West Virginia, including the locality of the mines of your complainants, and points in various other States, in interstate Commerce and as such common carrier is subject to the provisions of the Act of Congress approved February 4, 1887, known as the interstate Commerce Act, and of acts amendatory thereto and supplementary thereof, including the Act known as the Transportation Act, 1920, approved February 28, 1920.

[fol. 6] IV. The Virginian Railway Company, defendant herein, is a corporation of the State of Virginia, having its usual place of business in the State of West Virginia, engaged as a common carrier in

the transportation of passengers and property wholly by railroad between points in the State of West Virginia, including the mines of your complainants aforesaid and points in various other states in interstate commerce and, as such common carrier, is subject to the provisions of the Interstate Commerce Act, approved February 4, 1887, and Acts amendatory thereto and supplementary thereof, including the Act known as the Transportation Act, 1920, approved February 28, 1920.

V. The Chesapeake and Ohio Railway Company and The Virginian Railway Company are independent common carriers each having access by its own rails or through trackage rights to the mines of your complainants and each of them and are engaged in the carriage of the coal, coke and other goods in competition as such carriers from said mines to the Atlantic seaboard and other points of destination in other States in interstate commerce.

VI. The mines of your complainants aforesaid are located in Fayette and Raleigh counties, West Virginia, in the heart of a field of bituminous coal production wherein is mined and produced a low volatile bituminous coal known as semi-anthracite or smokeless coal of West Virginia. In addition to the mines of your complainants [fol. 7] aforesaid there are many other mines in the State of West Virginia producing the same quality of coal served in interstate commerce in some cases by both lines of railroad and in very many other cases served singly by one or the other of the carriers defendant herein. All of said mines, whether local to one line of railroad or served by each of them, are in active competition in the marketing in other states of smokeless coal produced and mined in West Virginia and transported in interstate commerce by said The Chesapeake and Ohio Railway Company and said The Virginian Railway Company; the said coal areas wherein said smokeless coal is produced are known locally on the lines of the defendant carriers as the New River District.

VII. The Interstate Commerce Commission is the administrative tribunal created by said Interstate Commerce Act for the administration thereof, and whose authority, powers and limitations are in said Act defined.

VIII. The provisions of the Interstate Commerce Act apply to common carriers engaged in the transportation of passengers or property in interstate commerce wholly by railroad or partly by railroad and partly by water when both are used under a common control management or arrangement for a continuous carriage or shipment. (Paragraph 1-A, Section I.)

The term "Transportation," as used in the Interstate Commerce Act, includes locomotives, cars and other vehicles, vessels and all instrumentalities or facilities of shipment or carriage, irrespective of [fol. 8] any ownership or contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing,

storage and handling of property transported. (Paragraph 3 of Section I.)

By the Interstate Commerce Act it is provided that it shall be the duty of every common carrier subject to the Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor and to establish through routes and just and reasonable rates, fares and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes. (Paragraph 4 of Section I.)

By the Interstate Commerce Act it is made the duty of all common carriers to establish, observe and enforce * * * just and reasonable regulations and practices affecting * * * the facilities for transportation * * * and all other matters relating to or connected with the receiving, handling, transportation, storing and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation and delivery of property subject to the provisions of this Act upon just and reasonable terms and every unjust and unreasonable classification, regulation and practice is prohibited and declared to be unlawful. (Paragraph 6 of Section I.)

The term "car service" in the Interstate Commerce Act is defined to include the use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars and other vehicles used in the transportation of property * * * by any carrier by railroad subject to this Act. (Paragraph 10 of Section I.)

[fol. 9] It is provided by the Interstate Commerce Act that it shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service, and every unjust and unreasonable rule and regulation with respect to car service is prohibited and declared to be unlawful. (Paragraph 11 of Section I.)

It is provided by the Interstate Commerce Act that it shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines, or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. (Paragraph 12 of Section I.)

By the Interstate Commerce Act the Interstate Commerce Commission is authorized, by general or special orders, to require all carriers by railroad subject to this Act, or any of them, to file with it from time to time their rules and regulations with respect to car service and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares and charges for transportation, and be subject to any or all of the rules relating thereto. (Paragraph 13 of Section I.)

By the Interstate Commerce Act it is provided that the Commission may, after hearing on a complaint, or upon its own initiative without complaint, establish reasonable rules, regulations and practices with respect to car service by carriers by railroad subject to this Act, in- [fol. 10] cluding the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for non-observance of such rules, regulations or practices. (Paragraph 14 of Section I.)

By the Interstate Commerce Act it is provided that it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatever or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (Paragraph 1 of Section III.)

By the Interstate Commerce Act it is provided that nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute but the provisions of this Act are in addition to such remedies. (Section 22; 22 Stat. L. 379.)

The obligations of carriers with respect to the distribution of cars are further defined in the Interstate Commerce Act in connection with the provision for an additional remedy to enforce such obligation, as follows:

"That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the Act to which this is a supplement and all Acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common [fol. 11] carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: Provided, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: Provided, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this Act or the Act to which it is a supplement." (Section 23; 25 Stat. L. 855.)

IX. Pursuant to the provisions of said Interstate Commerce Act, in last preceding article set out, each of carriers defendant herein for many years has established and applied rules for the distribution of

its coal cars among its shippers during recurring periods when the supply of cars available for distribution for transportation of coal among the coal mines served by it not equal the requirements of such mines, which said rules provided for the ratings of said mines and the distribution of cars to them so that each mine served by said carrier in the region should receive its just and reasonable proportion of the cars available on said railroad for distribution to the coal mines served by it. Prior to Federal control during the period of the war each of the defendant carriers, by its rules, provided for the rating and distribution of its cars among the mines without reference to the car supply that was furnished by any other carrier. The ratings of all [fol. 12] mines under said rules represent, for purposes of car distribution, the daily capacity of the mines to produce and ship coal.

X. By proclamation, dated December 26, 1917, the President took possession and assumed control of the railroads of the carriers defendant herein and operated the same through the Director General of Railroads from January 1, 1918, to and including February 29, 1920. Under said proclamation the railroads of the United States were permitted to be operated and were operated under the control and direction of the United States solely according to war needs, and so far as the United States might choose in combination as if they constituted a single carrier, regardless of the obligations of said roads when operated as independent and competing carriers according to the law when not under such Federal control. During the period of said Federal control the Director General of Railroads published and put in force through his Car Service Section, and applied rules for the rating of coal mines other than anthracite and for the distribution of available empty cars to said mines. The said rules were contained in a circular of said Car Service Section known as Circular CS-31. Rule 2 of said Circular CS-31 provided:

"Copies of orders for cars for a mine that is joint with any other carrier (steam, electric or water) shall be filed with the designated representative of each such carrier, such combinations of orders must not exceed the gross daily rating of the mine."

The rules contained in the circular aforesaid were subsequently revised and republished and put in force in Circular CS-31 Revised, [fol. 13] effective January 10, 1919. In said Circular CS-31 Revised the rule that had theretofore applied as Rule 2 in the original circular was republished and put in force and applied without change in verbiage but was designated as Rule 4 of the rules for the distribution of cars to coal mines in CS-31 Revised.

Said Rule 4, as contained in said Circular CS-31 Revised was continued in force and applied by the Director General of Railroads to the end of Federal control. Copy of the said circular CS-31 Revised is hereto appended as Appendix A.

XI. On February 29, 1920, the railroads of the United States were released from the Federal control under said proclamation of the President; by circular dated March 2, 1920, the Interstate Commerce

Commission recommended that the carriers, both those defendant herein and all others subject to the Interstate Commerce Act, continue in force the said Circular CS-31 Revised until such time as the experience of the carriers or the Commission should dictate other and more appropriate rules for the rating and distribution of cars to coal mines; and in accordance with and in compliance with said action of the Commission, the rules of said circular were continued in force by the carriers defendant herein.

Under date of April 15, 1920, the Interstate Commerce Commission, acting under its emergency powers, as defined in Paragraph 15 of Section I of the Interstate Commerce Act, ordered and directed the carriers to modify one of the rules contained in said Circular CS-31 Revised, which said modification is not here involved, but otherwise recommended that the other rules of said Circular, including Rule 4 aforesaid, be continued in force and applied; and in ac- [fol. 14] cordance with and in compliance with said action of the Commission, the rules of said circular were continued in force by the carriers defendant herein.

XII. On or about July 8, 1920, the carriers defendant herein applied to the Interstate Commerce Commission for permission to abrogate Rule 4 and to put into effect the rule laid down in the Illinois case.

This application was refused by the Commission and because of said refusal said Rule 4 was continued in effect by the carriers defendant herein.

Thereafter on, to-wit: January 11, 1921, your complainants filed complaints before the Interstate Commerce Commission separately against The Chesapeake and Ohio Railway Company and the Virginian Railway Company respectively, alleging that said Rule 4 of Circular CS-31 Revised was unjust and unreasonable in violation of Section I of the Interstate Commerce Act as amended, particularly Paragraphs 11 and 12 of said Section 1, and unduly preferential of complainant's competitors and prejudicial of complainants in violation of Section III of said Act. These two cases are known, respectively, as Interstate Commerce Commission Docket Nos. 12083 and 12084. The above numbered separate complaints were consolidated with each other and certain other similar complaints, known as Interstate Commerce Commission Dockets Nos. 12081 and 12082, and were assigned for hearing, brief and argument and decision to Division V of the Commission; were duly briefed, heard and argued before said Commission and the decision of the Commission thereupon was issued by said Division V on June 21, 1921, Fairmont and [fol. 15] Cleveland Coal Company vs. B. & O. R. R. Co., 62 I. C. C. 269. Copy of said decision is hereto appended as Appendix B.

In said decision the Commission found that said Rule 4 of Circular CS-31 Revised was unjust and unreasonable and unduly prejudicial of complainants and others similarly circumstanced and unduly preferential of the mines on each of the carriers defendant herein that were served singly by each such carrier; held and found that a certain rule laid down in the case of In re Irregularities in Mine Rat-

ings, 25 I. C. C. 286, known as the Illinois case, was the just and proper rule and, while stating "We have not required that car service rules be filed as tariff schedules," directed as follows: "We shall expect, however, that defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies thereof with us."

XIII. The Commission in said decision found that a certain rule of car distribution, in lieu of said Rule 4 of Circular CS-31 Revised, to wit: the rule of the Illinois case, would be just and reasonable, and authorized and directed the carriers to establish and apply said rule in the future. This rule, so authorized and directed, limited the right of your complainants on days when they ordered cars from both their connections to order from each only 75 per cent of the mine rating. In reliance on and pursuant to such authority and direction the carriers defendant herein amended their car service rules so as to conform with said findings of the Commission and filed the said Illinois rule of car distribution. By said action of the Commission said Rule 4 was abrogated and the Illinois rule came for the time being into effect as the rule prescribed by the Commission.

[fol. 16] XIV. Complaints substantially similar to those involved in Dockets 12081-12084 were filed by certain operators of mines, similiarly circumstanced, located in Illinois and Indiana, against carriers serving mines in those states, which said complaints were known as Interstate Commerce Commission Dockets Nos. 12362 and 12399, respectively, and are collectively known as Bell & Zoller Coal Company, et al., vs. Baltimore & Ohio Southwestern Railroad Company, et al. Hearing was duly had upon said latter numbered complaints and a tentative report upon such record was made by an examiner of the Commission in which it was proposed to confirm the decision in the Fairmont & Cleveland Coal Company cases, Dockets Nos. 12081-12084. Petition had in the meantime been filed to reopen for further consideration Dockets Nos. 12081-12084 and the Commission did reopen said cases and consolidate the same for argument with the records made in the Bell & Zoller Coal Company cases. Argument was had upon the records thus consolidated in all of these cases before the Commission and on December 11, 1922, the Commission entered its decision, ruling and order, copy of which is hereto appended as Appendix C. Said decision is known as Bell & Zoller Coal Company, et al., vs. Baltimore & Ohio Southwestern Railroad Company, et al., which case includes the cases, Dockets Nos. 12081-12084, and will hereinafter be referred to as the Bell & Zoller decision. In its decision, ruling and order (Appendix C) the Interstate Commerce Commission found, in reversal of its previous decision, ruling and order, that Rule 4 of Circular CS-31 Revised was not "in principle unjust or unreasonable or unduly prejudicial" and that "our former conclusions in the Fairmont cases—are reversed" and the Commission entered an order to dismiss [fol. 17] the complaints in all of the cases recited in which an abrogation of said Rule 4 had been sought and previously granted. By thus reversing its previous conclusions and directions in the Fairmont

case the Commission annulled as of the date of December 11, 1922, its previous action by which it abrogated Rule 4, and substituted the Illinois rule therefor, and thereby, by its own action, re-established Rule 4 as the rule to be followed by the railroads. In its decision the Commission found inter alia:

"The operation of Rule 4 is shown by the following example: A joint mine with a gross daily rating of 50 cars located on carriers A and B orders all of its cars from carrier A which has an 80 per cent car supply. The joint mine will receive the same number of cars as a local mine with a daily rating of 50 cars on carrier A. However, if carrier B has a 50 per cent car supply and the joint mine divides its order equally between the two carriers it will receive 80 per cent of 25 cars, or 20 cars, from carrier A, and 50 per cent of 25 cars, or 12.5 cars, from carrier B, a total of 32.5 cars compared with 40 cars received by the local mine on carrier A. Should the joint mine order more than half its cars from the carrier with the greater car supply this will change the figures somewhat, but in no instance will the joint mine receive as many cars as the local mine served by carrier A if the orders are divided. The complainants concede that the joint mine will, in the aggregate, receive more cars than the local mine located on the carrier with the lesser car supply, and it possibly may receive more cars on the average than the local mines of similar rating on both carriers."

By said decision, order and ruling of the Commission each of the carriers, defendant herein, is authorized and required to limit its car service to your complainants, and others similarly circumstanced, [fol. 18] below the car service which it furnishes to the local mines served by it, as in said Commission's report set out, and said limitation of obligation is arrived at, as to each carrier, by reason of car service and transportation furnished to your complainants, and others similarly circumstanced by another independent and competing carrier.

Under said decision, order and ruling if any of your complainants in time of car shortage has availed itself of its right of shipment by the carrier which has the largest available percentage of car supply, to ship so much of its coal as said carrier can take and then desires to ship the remainder of its goods by the other independent and competing carrier, said other carrier is prohibited from giving any transportation service whatever to said complainant solely because of the first carrier having taken a portion of the goods which your complainant has desired to ship by it. Thus if one of your complainants desires to ship all its coal to the Atlantic seaboard by one of said carriers and orders cars therefor and said carrier, by reason of having only an 80 per cent car supply is able to transport only 80 per cent of said coal, the other of said carriers on whose line your complainant is located, and which has a 40 per cent car supply, and by whom your complainant desires to ship the balance of its coal to the Atlantic seaboard, is prohibited from giving any transportation service to your complainant although to other shippers located on its road, desiring to ship coal by it is giving a 40 per cent service.

XV. Acting under and because of said decision, order and ruling of the Commission of December 11, 1922, and as your complainants are informed and believe and therefore allege, in fear and duress of [fol. 19] the penalties imposed by law in case of violation of any decisions, orders or rulings which the Commission is authorized to make, the carriers, defendant herein, have put in force, and notified your complainants that they have put in force Rule 4 of Circular CS-31 Revised, effective in the case of The Chesapeake and Ohio Railway Company on February 10, 1923, and in the case of The Virginian Railway Company on February 1, 1923.

XVI. On, to-wit, January 11, 1923, your complainants, joined with certain other operators of coal mines similarly circumstanced, filed with the Interstate Commerce Commission a petition to reopen said proceedings known as Dockets 12081-12084, inclusive, but the Interstate Commerce Commission has failed to take any action thereon and the decision, ruling and order made December 11, 1922, and the action of the carriers, defendant herein putting in force, effective February 1 and February 10, respectively, said Rule 4, continue in full force and unmodified.

XVII. The mines of your complainants are in large part deep shaft mines which required for their opening and development a large capital investment much in excess of that required for the opening or development of the ordinary drift or slope mine; said shaft mines carry a large overhead charge and by reason of the capital expenditure required in their development and said large overhead charge are peculiarly dependent for successful and profitable operation upon continuous and steady operation at or near their capacity and upon transportation facilities and service which will permit of this.

[fol. 20] The properties where said mines were developed lay between the locations of The Chesapeake and Ohio and The Virginian Railways and were readily capable, by the building of short railroad lines, of being brought into connection with both of said trunk lines. An investment of large sums was made in the development of said mines and the building by the investors therein of two railroads, to-wit, the White Oak Railway and the Piney River and Paint Creek Railroad, to connect the mines with both trunk lines in reliance on the geographical location of said properties being such that they were capable of being served and would be entitled to be served by both of said lines, and in reliance on securing, by the full service of each of said lines as a competing and independent carrier, the transportation facilities which were essential to the successful operation of the properties. In 1917 after said White Oak Railway and Piney River and Paint Creek Railroad had been operated for a period of five years by The Chesapeake and Ohio and The Virginian as joint lessees, during which time the mines located in the leased lines had had from each of said lessors full transportation service free from the restrictions as to such service now imposed by said Rule 4, said railroads were, at the solicitation

of the trunk lines, sold and conveyed one to The Chesapeake and Ohio Railway Company and the other to The Virginian Railway Company with full reciprocal trackage rights for a period of 99 years granted by each purchasing trunk line to the other trunk line, thereby assuring for said period of 99 years full access by both trunk lines to the mines located on each of the purchased roads. The stock of both the White Oak Railway Company and the Piney River & Paint Creek Railroad Company, as well as the stock of the complainant mining companies whose properties had been developed and connected with the trunk lines by the construction of [fol. 21] said railroads, was then owned by The New River Company as it had previously been by the New River Fuel Company, of which The New River Company was the successor.

In order to assure to the mines located on said roads the continued full service of both of said trunk lines essential to their successful operation, it was stipulated by The New River Company that as part of the consideration for said sale an agreement should be entered into by The Chesapeake and Ohio Railway Company and The Virginian Railway Company, respectively, with The New River Company that the trackage rights to be reciprocally granted by each purchasing trunk line to the other trunk line over the railroads purchased should be maintained in full force and effect for said period of 99 years, and that all the terms of said trackage agreements should during said period be fully performed and observed by the trunk lines; it was also stipulated that the proposed agreement of purchase and sale, including said agreement with The New River Company as to the continuance of the trackage agreement, and said trackage agreement itself, should not go into effect until they had been submitted to the Interstate Commerce Commission for its consideration and formal or informal approval. All of said agreements were so submitted, and the Interstate Commerce Commission making no objection thereto, the sale was consummated in accordance with said agreements. By said agreement entered into by said The Chesapeake and Ohio Railway Company and The Virginian Railway Company the right was vested in The New River Company to the continuance of the full service of said carriers over said road to the mines and properties located thereon. The denial of said service by either of said carriers on account or by reason of certain shipments having been made over the other of said carriers, constitutes an unlawful denial of the service which by said agreement was in- [fol. 22] tended to be secured and was secured to The New River Company for the mines located on said purchased railroads.

XVIII. There is at the present time a shortage of cars on both the defendant carriers, neither having currently a supply of cars available for the loading and transportation of coal equal to the requirements therefor of the mines served by it, including the mines of your complainants.

XIX. If said carriers furnish cars only in accordance with said decision, ruling and order of December 11, 1922, and said Rule 4 of CS-31 Revised, the supply of cars so furnished will be entirely

inadequate to transport the coal which the mines of your complainants have been developed to produce and are producing and which they have available for shipment and desire to ship.

XX. Your complainants desire to use each defendant carrier to ship in interstate commerce the full amount of coal which said carrier can receive and transport for your complainants on a parity with others offering a similar amount of tonnage to said carrier for such shipment, and your complainants and each of them are prepared to ship and desire to ship by each of said carriers coal in excess of the amount which said carrier can transport on such a parity. Your complainants are prepared to pay and offer to pay in the manner provided by law the freight charges on all coal which the defendant carriers will accept for shipment.

[fol. 23] XX. Said decision, ruling and order of the Interstate Commerce Commission of December 11, 1922, and said Rule 4 put into effect by the defendant carriers in compliance therewith, constitutes an encroachment upon and a curtailment and denial of the legal right of your complainants and each of them to the service of a common carrier in interstate commerce on a parity with other shippers offering similar shipments to said carrier and of the carrier's legal duty and legal and property right as a common carrier to serve your complainants as such common carrier and deprives your complainants, and each of them, of their property and legal rights without due process of law and of the equal protection of the laws assured by the constitutions and laws of Virginia, of West Virginia and of the United States.

XXII. Said decision, ruling and order and said Rule 4 are discriminatory against your complainants and each of them as producers and shippers of a certain particular commodity, to-wit: coal, as against shippers of other classes of merchandise who, throughout the United States, when by their geographical location they are able to ship by more than one common carrier, have and enjoy the right of service as to transportation of goods which they desire to ship by and offer for shipments to one of said carriers on a parity with other shippers offering similar shipments by said carrier, which said service they have and enjoy regardless of what shipments may have been made of other goods by another carrier.

[fol. 24] XXIII. Said decision, ruling and order of December 11, 1922, and said Rule 4 imposes the obligation on a common carrier to inquire and ascertain what shipments have been made in interstate commerce by a shipper through another and independent and competing carrier and, if a certain amount of coal has been shipped by said independent and competing carrier, entirely to deny and refuse any transportation in interstate commerce to the shipper tendering goods for shipment or partly to deny and refuse such transportation if some shipments have been made by such other competing carrier, thereby permitting and requiring such carrier to discriminate against a shipper who has made use of a com-

peting common carrier and in favor of a shipper who deals exclusively with one of the competing carriers, and such discrimination is contrary to the laws of the United States and of the States of Virginia and West Virginia.

XXIV. Said decision, ruling and order of December 11, 1922, authorizes and requires each of two competing and independent common carriers, when a certain particular commodity, to-wit, coal, is produced and offered for shipment to any extent in excess of what the car supply of such carriers makes it possible for them to transport, to cease to act as a separate and independent carrier and to cease as such to furnish to shippers tendering goods to it equal and proportionate service according to the goods offered to it and the cars which it has available and authorizes and requires the two competing and independent carriers to act in combination one with the other, and, in such combination together, to give to the shipper only [fol. 25] such service as he would be entitled to if the two independent carriers were in fact a single corporate carrier; and, if one of said carriers has transported a certain amount of goods for the shipper, authorizes and requires the other carrier to refuse any transportation of goods tendered to it. It is contrary to the laws of the United States and of the States of Virginia and West Virginia for two independent and competing carriers thus to combine to limit the facilities which, as common carriers, they will afford to shippers tendering to them separately as independent common carriers goods to be shipped; there is no power vested by law in the Interstate Commerce Commission to authorize or require by a decision, ruling or order two railroads which are independent and competing carriers serving the same territory, to thus act and operate in combination, and in such combination so to limit facilities which a shipper offering for shipment goods to them separately as independent carriers is by law entitled to; and such combination and limitation is in violation of the laws and statutes of the United States and of the States of Virginia and West Virginia and constitutes under said laws and statutes an illegal combination in restraint of trade and commerce and of interstate trade and commerce, and it is a violation and denial of the legal right of each of your complainants to deal with an independent common carrier as such, and to have transportation from each such carrier without discrimination because of other shipments which it has made by another separate and independent common carrier.

XXIV. The Interstate Commerce Commission has by said decision, ruling and order of December 11, 1922, attempted to curtail and deny the legal right of a shipper to transportation service in in- [fol. 26] terstate commerce from a common carrier on a parity with other shippers offering similar goods for shipment, for the purpose of bringing about what a majority of said Commission now conceives to be a desirable adjustment of labor conditions as between different mines; no authority is vested by law in said Commission to adjust mine labor conditions or to use its powers of regulation of railroads and common carriers, directly or indirectly, for any such

purpose; said decision, ruling and order of the Commission is in fact arbitrary, unjust and unreasonable in its effect upon mine labor conditions in that it will, in times of car shortage as compared with times of full car supply, disproportionately affect and curtail the production of mines accessible to two or more carriers as compared with those accessible to only one carrier, thereby disorganizing the labor and production organization of said mines accessible to and customarily availing themselves of the services of two or more carriers, and if allowed to take effect will seriously curtail production of coal in the United States in that, through the great variation which it arbitrarily and artificially imposes on the production of mines which are so located as to be accessible to two or more roads and which normally use and have been developed to use the transportation service of said two or more roads, it will demoralize the labor and production organization of such mines so as to render it impossible for them to retain a working force and organization proportional to their normal capacity and output.

XXVI. It is a common law, statutory and property right of each of your complainants to have goods which it desires to have shipped by a common carrier in interstate commerce accepted and received [fol. 27] for transportation without discrimination as to transportation and car supply between it and other shippers desiring to have similar goods shipped by the same carrier and there is a reciprocal legal duty and obligation on the carrier, regardless of what shipments the shipper may have made of other goods over another competing road, to receive and ship the goods offered by a shipper on a parity with other parties so offering goods to it for shipment and without discrimination between parties so tendering such shipments; if your complainants are deprived of the transportation rights to which they are entitled their investments and property in the mines owned by them and which are dependent on such transportation will be lost or seriously impaired.

XXVII. No right or power is by law vested in the Interstate Commerce Commission to deprive a shipper of his right, on a parity with others offering goods for shipment, to the service of a common carrier, or to prohibit the carrier from performing such service, and the decision, ruling and order of December 11, 1922, of the Interstate Commerce Commission and the denial by The Chesapeake and Ohio Railway Company and The Virginian Railway Company, under duress of said decision, ruling and order made by the Interstate Commerce Commission as hereinbefore stated, of service in interstate commerce to your complainants on a parity with other shippers is without warrant in law.

XXVIII. The curtailment in accordance with said decision, ruling and order of December 11, 1922, and said Rule 4 of the said trans- [fol. 28] portation service in interstate commerce of the defendant carriers to your complainants and each of them, will it said decision, ruling, order and rule are permitted to operate, result in great loss and irreparable damage to your complainants and each of them and

your complainants have no plain, sufficient and adequate remedy at law and can have adequate relief only through the exercise of the equity powers of this honorable court.

XXIX. Your complainants and each of them are organized as to capital investment, mine development, supplies and equipment, working capital, administrative organization, labor force, housing facilities and selling organization to mine, handle and market the full amount of coal which, with the full service of each of said defendant carriers as an independent and competing carrier without discrimination between your complainants and other shippers offering shipments to said carriers, your complainants are entitled to by reason of the geographical location of their mines and the access of each of said carriers thereto; and your complainants have entered into contracts for the sale of coal based on the output which the furnishing of such facilities would enable them to transport and market. Said investment and organization have been made and said contracts have been entered into by your complainants and each of them in reliance on the transportation which they are lawfully entitled to from each of the carriers defendant and which they have uninterruptedly had and enjoyed for a long period of years, except during the period of Federal control when the railroads of the United States, including those of the defendant carriers, were operated as a unit solely according to war needs, and for a short period after the termination of said period of Federal control, during which said Rule [fol. 29] 4 was permitted by the Interstate Commerce Commission to remain in force, and except as the car supply of your complainants was by the original decision in the Fairmont case restricted slightly in comparison with the restriction now attempted to be imposed. If said Rule 4, CS-31 Revised, is permitted to be applied your complainants will suffer great and irreparable damage in the loss of returns on their investment, wastage and disuse of their equipment, wastage and lack of use for their houses and supplies, laying off, demoralization and loss of their labor force, lack of employment and demoralization of their selling organization, loss of the profits under existing contracts by reason of inability to deliver the coal contracted to be delivered thereunder, damage claims for non-delivery, and loss of sale of coal and contracts of sale which, except for the denial and refusal of the transportation facilities to which they are entitled your complainants are in position to make.

I. Wherefore, your complainants, and each of them, pray: That there be ordered and granted by the court a temporary stay or suspension of the operation of said decision, ruling and order of December 11, 1922, of the Interstate Commerce Commission and of said Rule 4 of Circular CS-31 Revised.

II. That a temporary or interlocutory injunction be issued, restraining and enjoining, until the further order of this court, the United States of America and the Interstate Commerce Commission from enforcing or applying said decision, ruling and order of December 11, 1922, and said United States of America and Interstate

Commerce Commission and said The Chesapeake and Ohio Railway Company and the said The Virginian Railway Company, and each of them, from enforcing or applying said Rule 4 of Circular CS-31 [fol. 30] Revised, or from restricting the supply of cars to your complainants, or any of them, in accordance with said rule.

III. That this court adjudge, order and decree that Rule 4 of Circular CS-31 Revised, now published by the carriers defendant herein, effective as of February 1, 1923, and February 10, 1923, respectively, is in violation of the legal rights of your complainants, and each of them, to transportation service from each of said carriers in interstate commerce and is null and void and without warrant in law, and that same be set aside and annulled.

IV. That this court adjudge that the decision, order and ruling of the Interstate Commerce Commission of December 11, 1922, in so far as it authorizes or requires the carriers defendant herein to put in operation said Rule 4 of Circular CS-31 Revised, or to restrict the transportation service and the furnishing of cars by said carriers defendant in accordance with said decision, order and ruling of December 11, 1922, or in accordance with said Rule 4 of Circular CS-31 Revised, is beyond the lawful right or authority of the United States of America and the Interstate Commerce Commission and is without warrant in law and is null and void, and that said decision, order and ruling of December 11, 1922, and said Rule 4 of Circular CS-31 Revised be set aside and annulled.

V. That the United States of America and the Interstate Commerce Commission and the carriers defendant, each and all, be perpetually restrained and enjoined from restricting, in accordance with said decision, ruling and order of December 11, 1922, of the Interstate Commerce Commission and with Rule 4 of Circular CS-31 Revised, the transportation service in interstate commerce and of said carriers defendant to your complainants and from so restricting the said service by or through any other decision, ruling, order or rule to the same effect.

[fol. 31] VI. That your complainants, and each of them, may have such other and further relief as to equity may appertain and as may be deemed by this honorable court fit and proper.

The New River Company, By Robert H. Gross, President. White Oak Fuel Company, By Robert H. Gross, President. Stuart Colliery Company, By Robert H. Gross, President. Dunnloop Coal & Coke Company, By Robert H. Gross, President. Beckley Coal & Coke Company, By Robert H. Gross, President. Mabscott Coal & Coke Company, By Robert H. Gross, President. Cranberry Fuel Company, By Robert H. Gross, President.

Affidavit of Robert H. Gross to above paper omitted in printing.

[fol. 32] APPENDIX A TO BILL OF COMPLAINT

United States Railroad Administration

Director General of Railroads

Chesapeake & Ohio Railroad

Circular CS-31 (Revised)

Richmond, Va., Jan. 6, 1920.

To all coal operators:

The following rules are promulgated to govern uniformly the rating of coal mines (other than anthracite) and car distribution to such mines. They will supersede the rules contained in Car Service Section Circular CS-31, issued at Richmond, Va., October 4, 1918, and are effective beginning January 10, 1920:

Rules for Rating for Car Distribution Purposes Coal Mines (Other Than Anthracite) Loading Coal at Mine Tipples

The following rules shall govern the rating of coal mines (other than anthracite) as the basis for the distribution of empty cars to such mines during periods of car shortage:

(a) The daily capacity of each mine (other than mines covered by paragraphs b and c) shall be determined by taking the total coal tonnage shipped by the mine during the preceding month, dividing it by the number of hours worked in producing it (see paragraph e) and multiplying the quotient by the number of hours in the recognized work day (not more than ten hours) of the individual mine. [fol. 33] The result shall be termed the "daily rating" of such mine, and shall be the basis on which cars shall be distributed to it during periods of car shortage.

(b) The daily capacity of a mine which is served jointly by or for two or more carriers (steam, electric or water) shall be determined by taking the total tonnage shipped by the mine via all such carriers during the preceding month, dividing it by the number of hours worked in producing it (see paragraph e) and multiplying the quotient by the number of hours in the recognized work day (not more than ten hours) of the individual mine. The result shall be termed the "gross daily rating" of such mine, and shall be the basis on which cars shall be distributed to it during periods of car shortage; provided, that if track or other limiting conditions further restrict its ability to ship via the Chesapeake & Ohio Railroad, such conditions shall be the limiting factor for the Chesapeake & Ohio Railroad's daily rating of such mine.

(c) The daily capacity of a mine delivering part of its output to a coking plant, to locomotives at the tipple or to local trade shall be determined by taking the total coal tonnage shipped in railroad cars during the preceding month, dividing it by the number of hours

worked (see paragraph e) and multiplying the quotient by the number of hours in the recognizd work day (not more than ten hours) of the individual mine. The result shall be termed the "daily ratin" of such mine and shall be the basis on which cars shall be distributed to it during periods of car shortage.

(d) When the fires are withdrawn from part (or all) of the ovens at an operation coking part of its output, for the purpose of shipping coal production formerly used in charging ovens, the daily rating of the mines shall be increased to include the average tonnage per day so diverted in the previous month, until the beginning of the next rating period, at which time the daily rating of the mine shall be determined in accordance with paragraph a or c, due allowance being made for such average tonnage so diverted in computing the new [fol. 34] daily rating. A corresponding decrease of the mine's rating will be made when the ovens are again placed in blast.

When a mine that has been coking its entire output desires to ship coal and the fires are withdrawn from part (or all) of its ovens, it shall be given a daily rating for coal shipments corresopnding to the average tonnage of coal formerly coked until the beginning of the next rating period, at which time the daily rating of the mines shall be determined in accordance with paragraph a or c.

(e) In determining the number of hours worked in each day at a mine, time will be counted from the established time for beginning work (or the actual time if earlier or later than the established time) on the tipple until the dumping of coal finally ceases for the day, making deductions for the noon intermission when it is taken, and for the time lost by reason of being blocked with loads, waiting for additional empty cars, or other railroad disability; provided, that if a greater number of hours is worked in the mine than on the tipple, the mine hours must be reported also, and the number of hours worked in the mine must then be used as the number of hours worked in producing the coal. (See paragraphs a, b, and c.) Time may may be deducted for railroad disability only when such railroad disability actually reduces the quantity of coal dumped that day. Time may be deducted when tipple is used for dumping coal into locomotives only when the tipple can not be simultaneously operated for loading cars.

(f) Daily ratings determined in accordance herewith will be revised monthly and made effective on the 10th of the month following the month's performance on which the rating is determined.

(g) If a mine be idle for a period of one full calendar month or more, the last rating determined will be the rating when work is resumed, provided the mine conditions be substantially the same as when the mine closed.

(h) Rating for development purposes based on current performance will be assigned to a new operation in previously undeveloped coal. A new mine will be furnished with a supply of cars sufficient [fol. 35] to enable it to work freely in the course of development for

a period not exceeding 6 months after shipments are begun; provided, that if theretofore its ability to load 150 tons per shift (not, however, to exceed 2 shifts per day) is established, it shall then be rated. A new operation of any other character shall be entitled to a development rating for a period of one month after shipments are begun.

(i) Each mine shall report on a prescribed form to the Chairman Car Allotment Commission, Huntington, W. Va., promptly at the close of each day:

1. The number of hours in the recognized work day;

2. The established time for beginning the day's work;

3. Actual time work was begun this day on tipple;

4. If noon hour intermission is taken, how long;

5. Time lost during the day account:

Waiting for railroad cars or other railroad disability .. — hours;
Strikes or mine labor shortage ..... — hours;
Mine disability ..... — hours;
No market ..... — hours;
All other causes ..... — hours;

6. Time work on tipple ceased for day;

7. Number of hours worked today on the tipple ——— and in the mine, ——————— (See paragraph e);

8. Number of net tons of coal loaded for shipment via Chesapeake & Ohio Railroad;

9. Total number of net tons of coal produced and shipped via each other outlet;

10. Number of coal loaders working today in mine.

Joint mines shall furnish this daily report to each carrier serving them.

If after notice from the railroad an operator persistently fails to furnish this daily report, he will be penalized by curtailment of his car supply to the amount of 25 per cent of distribution for one week.

(j) At the close of each month the mine manager or superintendent in charge of actual operation shall report under oath on a [fol. 36] prescribed form to the Chairman Car Allotment Commission, Huntington, W. Va., having jurisdiction, separately for each mine for each month, as follows:

1. Number of hours in the recognized workday;

2. Total number of net tons of coal produced;

3. Total number of net tons of coal shipped via the Chesapeake & Ohio Railroad;

4. Total number of net tons of coal shipped via each other outlet;

5. Total number of hours worked during the month; (See paragraph e.)

6. Average number of coal loaders working daily in mine during month;

7. Total time lost during month account:

Waiting for railroad cars or other railroad disability ..	— hours;
Strikes or mine labor shortage	— hours;
Mine disability	— hours;
No market	— hours;
All other causes	— hours;
Total, all mine causes	— hours.

This report must be forwarded not later than the 3rd of the month following that for which the statement is furnished; provided, that where the location of the mine makes it inconvenient to furnish a report under oath by that date, a report not under oath may be forwarded and the sworn report forwarded not later than one week after. Joint mines shall furnish this monthly report to each carrier serving them.

(k) If an operator declines or persistently fails to make reports or to make accurate reports to the carrier as required herein, it will be assumed that the mine worked full hours in producing and loading into railroad cars the tonnage shipped and the daily rating will be computed accordingly.

(l) A statement showing the mine ratings which will govern the car distribution for the succeeding month will be furnished as soon [fol. 37] as such ratings are ascertained to such coal mines on this railroad as make application for the same. Such statement will show the mine rating of each mine and the total mine ratings of each coal loading district and the aggregate ratings for all mines and all districts on this railroad, and the percentage of each such figure to the total.

Rules Governing the Distribution of Cars to Coal Mine Tipples (Other Than Anthracite)

Whenever the available car supply in any region (or district) is such that all orders for cars can be filled, cars shall be placed at each mine in accordance with its daily order, except that whenever a mine holds unbilled coal loads, it shall be entitled only to empty cars equal in number to the difference between the rating last established for the mine and the number of unbilled coal loads so held. Whenever the available car supply is such that all orders for cars cannot be filled, each mine shall be given its pro rata share of cars in accordance with the following rules:

1. The daily rating, or the daily order for cars if less than the rating, shall be the basis for car distribution.

2. Grouping of mines, or pooling of cars as between mines, will not be permitted.

3. On application of mine operators and in the discretion of the railroad, cars may be placed on such days only and at such mines only as may elect to work, and overs and shortages in car supply resulting from this distribution shall be adjusted on succeeding days.

4. Each mine operator shall report to the local car distributor at 4 p. m. daily:

(a) Number of unconsigned loads on hand at 7 a. m.

(b) Number of empty and partly loaded cars on hand at 7 a. m.

(c) Additional number of empty cars received during the day.

(d) Aggregate number of empty cars received during the day.

[fol. 38] (e) Number of cars loaded during the day.

(f) Number of empty cars standing over at close of day.

(g) Number of empty cars standing over at close of day which were received prior to 7 a. m., ———— cars; and prior to 10 a. m., ———— cars.

(h) Number of partly loaded cars under tipple at close of day.

(i) Number of unconsigned loads on hand at close of day.

(j) Additional number of empty cars required for loading following day.

Copies of orders for cars for a mine that is joint with any other carrier (steam, electric, or water) shall be filed with a designated representative of each such carrier. Such combinations must not exceed the gross daily rating of the mine.

5. The recognized standard car for coal car distribution is 50 tons. Others are compared thereto by tenths of a car; i. e., 80,000 pounds capacity equals eight-tenths (.8) of a car; 140,000 pounds capacity one and four-tenths (1.4) cars, etc., and cars must be charged and car distribution records maintained accordingly.

6. (a) All cars placed at a mine during each period of 24 hours ending at 10 o'clock a. m. (or when Sundays or holidays intervene, the longer period ending at 10 o'clock a. m. of the day immediately succeeding the Sunday or holiday) shall be charged against the mine on the day when such period ends; provided, that if the cars placed at 7 o'clock a. m. (not including partly loaded cars) do not equal or exceed in number of 25 per cent of the daily rating (or order if less than the rating) then no cars will be charged against the mine that day except such as are loaded on that day.

(b) Cars placed between 10 o'clock a. m and the time the mine ceases work for the day, if loaded or partly loaded on the day placed, will be charged against the mine on that day.

(c) All cars of other than railroad ownership (commonly called [fol. 39] "private cars" placed for owners' loading will be considered as ordered.

7. The pro rata share of cars to which each mine is entitled except as provided in Rule 9, shall be based on its rating (or order when less than its rating). When a mine has empty or partly loaded cars which were placed prior to 7 a. m., or unconsigned loads standing over at the close of the day's business, such cars shall be charged against it each day thereafter while they are detained, except as otherwise provided in Rule 6.

If on any day a mine be furnished with cars totaling less than 100 per cent of its rating (or order if less than its rating) and for any cause whatever other than railroad responsibility fails to load the entire number, the mine shall be considered as having been furnished 100 per cent of its requirements, and its order shall be arbitrarily reduced to the number of cars furnished.

8. Private cars and such cars as are assigned to mines by the Car Service Section, United States Railroad Administration, will be designated as "assigned" cars. All other cars will be designated as "unassigned" cars.

9. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply pro rated to the other mines, based on a revised percentage by reason of such elimination.

10. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share.

11. If a mine receives more or less cars than it is entitled to during any period, as provided in Rule 6 (and after eliminating assigned cars as provided in Rule 9), it will be charged with a surplus or credited with a shortage accordingly, and the discrepancy adjusted as promptly as practicable.

[fol. 40] 12. A statement showing the car distribution for the preceding month will be furnished as soon as such distribution is ascertained, to such coal mines on this railroad as make application for the same. Such statement will show the car distribution of each mine, the total car distribution of each coal loading district, the aggregate distribution for all mines and all districts on this railroad, and the percentage of each such figure to the total.

13. Such additional information as may be necessary will be asked for from time to time.

W. L. Booth, Superintendent Transportation.

[fol. 41] APPENDIX B TO BILL OF COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. 12081*

FAIRMONT & CLEVELAND COAL COMPANY

vs.

BALTIMORE & OHIO RAILROAD COMPANY

Submitted May 24, 1921. Decided June 21, 1921.

Defendants' practices in distributing cars to mines of complainants for coal loading found to be unreasonable and unduly prejudicial. Reasonable and nonprejudicial rules prescribed for the future.

James W. Carmalt for complainants and interveners supporting complaints.

Francis R. Cross for Baltimore & Ohio Railroad Company; James Stillwell for Monongahela Railway Company; W. H. T. Loyall for Virginian Railway Company, and W. S. Bronson for Chesapeake & Ohio Railway Company.

P. H. Greenlaw and Thomas L. Phillips for Fifth and Ninth Districts Coal Bureau; George T. Bell, George S. Brackett, and G. H. Caperton for Northern West Virginia Coal Operators' Association and local mine operators in the New River district, and F. H. Harwood for Illinois Coal Traffic Bureau, interveners.

Report of the Commission

Division 5, Commissioners Clark, Aitchison, and Potter

By DIVISION 5:

These cases involve the same issue, were heard together, and will be disposed of in one report.

[fol. 42] Complainants are corporations in West Virginia engaged in the operation of bituminous coal mines. The mine of complainant in Nos. 12081 and 12082, known as the Parker Run mine, is located at Fairmont, W. Va. Complainant owns and maintains about 1.5 miles of siding on its mining property, connected at the

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*This report also embraces No. 12082, Same vs. Monongahela Railway Company; No. 12083, New River Company et al. vs. Virginian Railway Company; and No. 12084, Same vs. Chesapeake & Ohio Railway Company.

west end with the Baltimore & Ohio Railroad and at the east end with the Monongahela Railway. The complainants in Nos. 12083 and 12084 operate 11 mines in the New River district, W. Va., which are served by the Chesapeake & Ohio and Virginian railways, as will hereinafter be more fully explained. The New River Company controls by stock ownership the other complainant corporations in the New River district.

It is alleged in substance that the rules, regulations, and practices governing the distribution of cars for the transportation of coal from the mines of complainants to interstate destinations have been since October, 1918, and still are, unjust, unreasonable, and unduly prejudicial, in violation of Section- 1 and 3 of the Interstate Commerce Act. We are asked to prescribe for the future just and reasonable rules, regulations, and practices with respect to the distribution of coal cars at mines served by two or more carriers, hereinafter termed joint mines.

An intervening petition in support of complainant's contentions was filed at the hearing in Nos. 12083 and 12084 by 14 coal companies operating 23 joint mines in the New River district. These interveners will hereinafter be treated as complainants. Intervening petitions in opposition to complainants' contentions were filed on behalf of the Northern West Virginia Coal Operators' Association in Nos. 12081 and 12082 and on behalf of 14 operators of local mines in the New River district in Nos. 12083 and 12084. The Fifth and Ninth Districts Coal Bureau and the Illinois Coal Traffic Bureau intervened in all four cases, but the latter took a neutral position. No evidence was offered by these interveners except the Northern West Virginia Coal Operators' Association, although the Fifth and Ninth Districts Coal Bureau filed a brief.

[fol. 43] In In re Irregularities in Mine Ratings, 25 I. C. C. 286, hereinafter referred to as the Illinois Case, we laid down the following rule to govern distribution, during the periods of car shortage, of coal cars to joint mines served by the Illinois Central and other carriers:

We think that on days for which it orders no cars from any other carrier, the junction-point mine should be given its pro rata of cars by the Illinois Central on the basis of its full rating; that on a day for which it orders cars from one other road, its rating on the Illinois Central for that day should be 75 per cent of its full rating, and that on a day for which it orders cars from two other roads, its rating on the Illinois Central for that day should be 50 per cent of its full rating.

This rule, however, was not followed by the defendants herein. The Baltimore & Ohio, Chesapeake & Ohio, and Monongahela treated the joint mines the same as local mines in the distribution of cars. They had no information of the number of cars ordered from the other carrier. So far as they were concerned the joint-mine operator could order and secure 100 per cent car supply from each road. The practice of the Virginian was unique. Its car supply practically met the demands of the shippers along its line. It therefore set aside a certain number of cars to take care of its fuel needs and of

mines under development and pro rated the remainder of its equipment in proportion to the shipments via the Virginian for the preceding 12 months. If one shipper, for example, were issued 480 cars in the pool, it was embargoed, after its loading exceeded the number of cars set aside for the mine or mines until the cars were made empty, and was penalized four days to permit the empties to return from the destination to the mines. This practice was followed at both local and joint mines.

Effective October 10, 1918, Car Service Circular CS-31 became effective, and under Rule 2 prescribed the following method for ordering cars for joint mines:

Copies of orders for cars from a mine that is joint with any other carriers (steam, electric or water) shall be filed with the designated [fol. 44] representative of each such carrier. Such combined requests must not exceed the gross daily rating of the mine.

After the signing of the armistice, and until the summer of 1919, there was a lessened demand for coal, and the resultant surplus of coal cars enabled carriers generally to accord all mines a full car supply. The limitations of the rule were not therefore felt until a car shortage developed in the summer of 1919. From that time until approximately December, 1920, the available supply of cars for coal loading throughout the country was insufficient to meet the demands.

At the time Circular CS-31 became effective the Chesapeake & Ohio and Virginian joint mines were zoned, and the car service rules affecting joint mines were not in force. Because of that fact mines zoned to the Virginian had to depend upon the Virginian and mines zoned to the Chesapeake & Ohio had to depend upon the Chesapeake & Ohio, exclusively, for cars.

On March 2, 1920, we issued a notice to carriers and shippers in which we recommended that until experience and careful study demonstrated that other rules would be more effective and beneficial especially during the remainder of the early spring, the uniform rules as contained in the Railroad Administration's Car Service Circular CS-31, Revised, be continued in effect. By further notice to carriers and shippers dated April 15, 1920, our notice of March 2 and our recommendation therein was modified as to Rule 8 of the circular. Rule 2 of Car Service Circular 31 became Rule 4 in the revised circular, but contained no change. The complaints are directed against the last sentence of Rule 4.

On July 8, 1920, the Chesapeake & Ohio and Virginian, on request of complainants, filed with us a petition asking that they be permitted to follow the rule laid down in the Illinois Case. We declined informally to take that action. These complaints followed.

There are two joint mines on the White Oak branch of the Chesapeake & Ohio extending from Glen Jean to Carlisle. This branch was formerly the White Oak Railway. Later the Chesapeake & Ohio [fol. 45] granted to the White Oak Railway trackage rights over this branch to enable it to reach these two mines. In the meantime the White Oak Railway had built a new line from Carlisle to Lochgelly and from Duncan's Crossing, a point intermediate to Lochgelly, to

Bishop, where it connected with the Virginian Railway. There are three mines located on this new line. In 1912 the Chesapeake & Ohio and the Virginian jointly leased the White Oak and the Piney River & Paint Creek Railroad. In 1917 the new line of the White Oak, above referred to, was purchased by the Virginian, and it is now known as its Wolf Creek Branch. In the same year the Chesapeake & Ohio purchased the Piney River & Paint Creek, now known as the Piney River & Paint Creek branch, which connected with the Piney Creek branch of the Chesapeake & Ohio at Beckley Junction. Three and two mines are located on these branches, respectively. The Chesapeake & Ohio also purchased the Price Hill division of the White Oak Railway extending from Price Hill Junction to Price Hill, a distance of about 2.5 miles. This division had no connection with the Wolf Creek branch of the Virginian. Under the terms of a trackage agreement dated November 1, 1917, the Chesapeake & Ohio granted certain trackage rights to the Virginian and the Virginian granted certain trackage rights to the Chesapeake & Ohio over the newly acquired lines, as well as over their own lines, to make the necessary connection with their own operation. This trackage agreement is substantially the same as the trackage agreement in effect between the Chesapeake & Ohio and the Virginian from 1912 to 1917, under which the White Oak and the Piney River & Paint Creek were operated under lease jointly by the Chesapeake & Ohio and the Virginian.

The agreement of sale, and trackage agreement, provided that each carrier should have equal access to and from all mine operations then or thereafter located on the tracks mentioned. For purposes of economy the Chesapeake & Ohio arranged to serve certain of the [fol. 46] mines located on its rails as agent for the Virginian, and the Virginian in turn agreed to place Chesapeake & Ohio cars at mines located on its rails. Each road retained the right to perform the service for itself in case complaint was made of the service performed by the order. Each of the mines is shown as being located on each of these roads and the rates are published as applicable by each. The White Oak and Piney River & Paint Creek railways were constructed and owned by the New River Company. One additional mine covered by the complaint is served jointly by the Chesapeake & Ohio and the Kanawha, Glen Jean & Eastern. This latter line is not a defendant and no further consideration will be given to that mine.

The complainants contend that they have the right to order 100 per cent of their gross daily ratings from each of their connections in times of car shortage and that each road is obligated to serve each of the mines tributary to its rails without discrimination.

It is testified that in acquiring their properties the operators considered it to be essential to successful operation that they have connections with two trunk lines. With this object in view the New River Company built the railways mentioned. The operators of the Parker Run mine commenced operations with the assurance of a car supply from each railroad, one of which was then in contemplation. It is testified that the transportation facilities were a

prime reason for the organization of the company. One of the complainants had the option of putting in a drift operation local to the Virginian or a shaft operation entailing a three-mile extension from the Virginian which would permit of a connection with the Chesapeake & Ohio. It elected to pursue the latter course, and built at its own expense one-half of the extension and the Virginian built the other half in order that service might be obtained from both roads.

The efforts of the local-mine operators were directed mainly to showing that a greater percentage of cars were left over at joint mines than at local mines; that the capacity of the present side- [fol. 47] tracks at joint mines would be insufficient to take care of the equipment if they were permitted to order their gross rating from each carrier; and the alleged advantage which the joint mine has by reason of being able to ship over the road having the greater car supply.

The Baltimore & Ohio contends that the rule in issue is fair and does not operate to the disadvantage of the joint mine, which has the advantage of being able to order cars from the line having the greater car supply. It is interested only to the extent of having rules which will operate equitably as between all shippers of coal situated on its rails, and which will assure the most expeditious handling of equipment.

The interveners operating local mines in the Fairmont and New River districts proceed on the theory that what complainants desire is to order cars on basis of 200 per cent of their maximum capacity to produce. This, however, is not the fact. Complainants' request, while thoretically based on the right to order 100 per cent from each carrier, is subject to restriction to its total mine rating.

The complainants further contend that the operation of the rule referred to amounts to a denial of car service to the complainants and that the rule was issued solely as a war measure. This contention is not supported by the record. On the contrary, it appears that at the time of the adoption of Circular CS-31 no consideration was given to the length of time the rules were to be made operative, although the fact that the roads were being operated as a unit under federal control was a prime reason for the adoption.

The practical operation of the rule complained of is as follows: Mine A is a joint mine served by the Chesapeake & Ohio and Virginian; mine B is local to the Chesapeake & Ohio while mine C is local to the Virginian. Each has a daily rating of 20 cars. On a certain day the Virginian has a 70 per cent car supply, and the Chesapeake & Ohio a 50 per cent car supply. Mine A divides its order between the Chesapeake & Ohio and the Virginian; that is, [fol. 48] it orders 10 cars from each carrier. Local mines B and C each orders 20 cars. As the car supply of the Chesapeake & Ohio is 50 per cent it would furnish mine A with 5 cars while the Virginian, with a 70 per cent car supply, would furnish 7 cars, or a total of 12 cars from both roads. Mine B would receive 10 cars from the Chesapeake & Ohio, and mine C 14 cars from the Virginian.

The joint mines in the New River district, during the month of August, 1920, under the operation of the rule here complained of, received 1,392.6 cars from the Chesapeake & Ohio and 1,881.8 cars from the Virginian, or 167.3 cars more from the Chesapeake & Ohio and 48.2 cars less from the Virginian than they were entitled to. If they had been accorded a similar car supply as local mines with like ratings located on defendants' lines they would have received 2,104.9 cars from the Chesapeake & Ohio and 3,471.1 cars from the Virginian. These joint mines received 183.6 cars less on the Chesapeake & Ohio and 714.6 cars less on the Virginian than they would have been entitled to during the said month under the rule approved by us in the Ilinois case.

During 1920 cars left over at local mines on the Chesapeake & Ohio averaged 8.2 per cent of cars placed, while those left over at joint mines in the New River district averaged 11.4 per cent. The left-overs on the Virginian at joint mines were slightly in excess of the left-overs at local mines, due in part to the physical conditions on what was formerly the White Oak Railway. The Virginian operates over that line only in the daytime, and efforts are made to get sufficient cars to the mines the night preceding for the commencement of operations the following day. If cars are placed too late in the afternoon to be loaded they are reported as being left over. A witness for the Chesapeake & Ohio testified that the question of left-over cars was largely a matter of policing, and that if proper information were given to each railroad regarding the order and supply of cars there would be no occasion for cars being left over at joint mines to a greater extent than at local mines. This witness testified that rule 4 is defective in that it does not require that all lines [fol. 49] serving joint mines be supplied with such information as would make over-ordering impracticable, and thus make full utilization of the empty equipment available from day to day.

The complainants concede that the railroads should exchange such information as will enable them to police left-over cars, and that very few joint mines have trackage facilities greater than their capacity to ship. No difference appears in the record in the latter respect between joint and local mines.

The interveners have filed in evidence a statement of competitive car supply on basis of equivalent number of full days worked by joint mines as against local mines in the New River district by months, for the period from March 1 to December 31, 1920, both dates inclusive. This statement shows that the joint mines worked 157.13 days and the local mines 123.78 days. An aggregate rating of the mines by each carrier is shown, together with the total cars supplied by each. The total cars supplied by both roads are divided by the average aggregate rating of both roads, and the result is shown as the equivalent of the number of full days worked. This statement is subject to the criticism that it takes the aggregate mine ratings rather than the number of cars ordered.

While it is true that the joint mine has an advantage by reason of its location on two railroads because of the additional markets which it can reach, it is likewise true that the joint mine is not always in

a position to avail itself of its alleged advantage because of the practice in the coal business to make contracts for yearly periods beginning with April 1. Neither is it possible at all times for the joint mines to order all their cars from the carrier having the greater car supply, as its contracts may also require shipments to be made by the line having the lesser car supply in order to meet its current obligations. It frequently happens that the joint mine receives a less car supply than the local mine situated on the road having the greater car supply.

In the Illinois Case we said:

Owners of junction-point mines have expended large sums in [fol. 50] order to secure connections with more than one road. The junction-point mine has available a more extensive and more varied market for its coal. It may at times be able to dispose of its product upon the second line of railroad, while the mine local to the first road is unable to market its output. In case of car shortage the junction-point mine is able to select the outlet which affords the best and most liberal means of transportation. These are important advantages to which the junction-point mine is entitled and in the reasonable enjoyment of which it should be protected.

* * * It would be unjustly discriminatory against the junction-point mine not to give reasonable recognition to its natural advantages of location.

We also stated that it was necessary, in order to avoid unjust discrimination in favor of the joint mine as compared with the local mine, to somewhat limit its power to assert its capacity against two or more carriers at the same time.

Following the views expressed in that case, and upon this record, we find that rule 4 of Circular CS-31 Revised, is unreasonable and unduly prejudicial to joint mines and unduly preferential of local mines, to the extent that it limits the aggregate orders of the joint mine to 100 per cent of its rating from both roads; and that for the future during periods of car shortage defendants should distribute cars to the joint mines on their lines here considered on the basis outlined in the Illinois Case, namely, on days when the joint mine orders cars from only one carrier it shall have cars based upon its full rating from that carrier, and on days on which it orders cars from both carriers its rating on each of such carriers shall be 75 per cent of its full rating, subject to the limitation that it shall on no day be supplied with cars in excess of its maximum rating. Information should be exchanged between carriers showing the left-over cars in order to prevent some of the abuses which have heretofore been pointed out.

Under paragraph 13 of section 1 of the interstate commerce act we are authorized by general special orders to require all the carriers [fol. 51] by railroad subject to the act to file with us from time to time their rules and regulations with respect to car service, and we may, in our discretion, direct that such rules and regulations be incorporated in the schedules showing rates, fares, and charges for transportation and be subject to any or all of the provisions of the act relating thereto.

We have not required that car service rules be filed as tariff schedules. We will not in this proceeding direct that the rules which we herein find to be reasonable be so filed. We shall expect, however, that defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies thereof with us.

By the Commission, Division 5.
George B. McGinty, Secretary. (Seal.)

62 I. C. C. (Washington: Government Printing: 1921.)

A true copy. George B. McGinty, Secy.

[fol. 52] APPENDIX C TO BILL OF COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. 12362*

BELL & ZOLLER COAL COMPANY et al.

vs.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY et al.

Submitted March 16, 1922. Decided December 11, 1922

Defendants' rules governing the distribution of cars to mines of complainants for coal loading found not unreasonable or unduly prejudicial. Decision in In Re Irregularities in Mine Ratings, 25 I. C. C., 286, distinguished and limited. Fairmont & Cleveland Coal Co. vs. B. & O. R. R. Co., 62 I. C. C., 269, reversed. Complaints dismissed.

Clarence B. Cardy, Cooper, Royse, Bogart & Gambill, Paul N. Bogart, and Samuel D. Royse for complainants in Nos. 12362 and 12399.

James W. Carmalt for complainants in Nos. 12081, 12082, 12083, and 12084.

O. W. Dynes for Chicago, Milwaukee & St. Paul Railway Company; A. P. Humburg for Illinois Central Railroad Company; Robert

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*This report also embraces No. 12399, Vigo Mining Company et al. vs. Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company et al.; No. 12081, Fairmont & Cleveland Coal Company vs. Baltimore & Ohio Railroad Company; No. 12082, Fairmont & Cleveland Coal Company vs. Monongahela Railway Company; No. 12083, New River Company et al. vs. Virginian Railway Company; and No. 12084, New River Company et al. vs. Chesapeake & Ohio Railway Company upon reargument.

[fol. 53] H. Widdicombe for Chicago & North Western Railway Company; Kenneth F. Burgess for Chicago, Burlington & Quincy Railroad Company; L. P. Day for Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; and W. S. Bronson for Chesapeake & Ohio Railroad Company.

P. H. Greenlaw for Fifth and Ninth Districts Coal Bureau.

Eugene McAuliffe for Union Colliery Company; John M. Sternhagen for Clinton Coal Company, W. S. Bogle Company, and S. B. Mines Company.

Eugene McAuliffe, F. X. Sextro, James Forrester, and George V. Penwell for committee of local mine operators of Illinois; George S. Brackett for Northern West Virginia Coal Operators' Association; G. H. Caperton for committee of local mine operators in New River district of West Virginia; and George T. Bell for interveners.

Report of the Commission

By the COMMISSION:

These cases involve similar issues and will be disposed of in one report.

In Fairmont & Cleveland Coal Co. vs. B. & O. R. R. Co., 62, I. C. C. 269, hereinafter termed the Fairmont cases, we had before us rule 4 of Car Service Circular CS-31 Revised. We found that rule to be unreasonable and unduly prejudicial to joint mines and unduly preferential of local mines, to the extent that it limited the aggregate orders for cars of the joint mine to 100 per cent of its gross daily rating. We also found that for the future, during periods of car shortage, defendants should distribute cars to the joint mines on their lines on the basis outlined in In re Irregularities in Mine Ratings, 25 I. C. C., 286, hereinafter called the Illinois case. In effect, that rule provided that on days when the joint mine orders cars from only one carrier it shall be furnished cars based on its full rating from that carrier, and on days on which it orders cars from both carriers its rating on each of such carriers for the purpose of ordering cars should be 75 per cent of its full rating, subject to the limitation [fol. 54] that on no day shall it be furnished with cars in excess of its maximum rating. No order was entered. Upon petition of intervening local mine operators, we reopened those cases for further argument, and consolidated them with Nos. 12362 and 12399. These cases were submitted together.

The complainants in the Fairmont cases operate joint mines in West Virginia, one of which, located in the Fairmont district, is served jointly by the Baltimore & Ohio and the Monongahela, and the others, located in the New River district, are served jointly by the Chesapeake & Ohio and the Virginian. Complainants in No. 12362 operate 61 joint and 18 local mines in Illinois, while complainants in No. 12399 operate 6 joint mines in Indiana. Some of the mines in the latter two cases are served by more than two carriers.

All the complaints substantially allege that defendants' rules, regulations, and practices governing the distribution of coal cars to

complainants' mines served jointly by two or more railroads have resulted in the distribution during car-shortage periods since October, 1918, of a smaller share of empty coal cars to complainants' mines than is distributed to and received by mines in the same territory which are served by one defendant carrier only; and have been and are unreasonable, unduly preferential of complainants' competitors, and unduly prejudicial to complainants, in violation of sections 1 and 3 of the interstate commerce act. We are asked to prescribe just, reasonable, and nondiscriminatory rules, regulations, and practices to govern the distribution of coal cars to mines served by more than one carrier.

Various operators and committees have intervened in opposition to the complaints in Nos. 12362 and 12399. The Union Colliery Company was the only intervener in whose behalf evidence was offered. Various intervening petitions were filed in Nos. 12081, 12082, 12083, and 12084, as appears in our report in the Fairmont cases, at page 270.

The defendants assume a neutral position and are merely concerned with the establishment of a rule that will be fair and rea- [fol. 55] sonable to all parties concerned, and which will be workable.

Throughout this report the term "local mine" will be used to designate a mine situated on and served by only one railroad. The term "joint mine" will denote a mine served by two or more railroads with their own rails or a mine situated on one railroad, but actually served by one or more additional carriers under trackage agreements or switching-absorption arrangements. Complainants' mines, which are described of record, are embraced within the term "joint mine."

For some years prior to 1912 there was constant controversy between the Illinois Central Railroad and the operators of coal mines located upon its rails relative to the mine ratings, which form the basis of car distribution in times of car shortage, and the rules governing such distribution of cars. The matter was finally submitted to us for determination, upon the record in a proceeding in which no other carrier was a party. In the Illinois case, decided December 3, 1912, we alluded to the rules of the different carriers, discussed the contentions of the conflicting interests, and laid down certain rules to be observed in the rating of mines under the circumstances of that case, and the following rule to govern the distribution of coal cars by the Illinois Central, during periods of car shortage, to mines served jointly by it and other carriers.

We think that on days for which it orders no cars from any other carrier, the junction-point mine (joint mine) should be given its pro rata of cars by the Illinois Central on the basis of its full rating; that on a day for which it orders cars from one other road, its rating on the Illinois Central for that day should be 75 per cent of its full rating; and that on a day for which it orders cars from two other roads, its rating on the Illinois Central for that day should be 50 per cent of its full rating.

These rules were thereafter followed by the Illinois Central. Certain other carriers in that territory, including the Chicago & Eastern [fol. 56] Illinois, hereinafter called the Eastern Illinois, Missouri Pacific, Chicago, Indianapolis & Louisville, and the Chicago, Terre Haute & Southeastern, voluntarily applied the same rule. The method of rating the mines on the Missouri Pacific was somewhat different. The Chicago, Burlington & Quincy, hereinafter referred to as the Burlington, treated all mines on its line on an equality so far as distribution was concerned. Its rules provided for rating the mines on the basis of the tonnage shipped over its road for 10 consecutive days when the mine operated full time and there was a full car supply, plus 20 per cent for development and increase. Every mine, whether local or joint, was entitled to order cars from it based on 100 per cent of its rating as thus determined. The witness produced by this carrier was unable to state in what manner cars were distributed by other carriers to mines served jointly by the Burlington and such other carriers. The methods of car distribution of the other carriers against which the complaints in Nos. 12362 and 12399 are directed are not shown of record, but apparently they were not uniform. Those adopted by the defendants in the Fairmont cases are set forth in our report in those cases.

During the World War agencies were created by the Government to deal with problems of fuel supply. In December, 1917, the principal railroads were taken under Federal control, and thereafter, until March 1, 1920, were operated as a unified and coordinated national system. In April, 1918, the United States Fuel Administration adopted a zoning system, the purpose of which was to minimize haulage, prevent cross hauls, control the distribution of coal to consuming territory, and to increase the supply of cars for coal loading. This system naturally affected and materially changed the distribution of coal so far as markets were concerned. The price of coal was fixed by the fuel administrator.

On October 10, 1918, in Circular CS-31, the United States Railroad Administration promulgated a uniform code of rules governing the rating of coal mines (other than anthracite), loading coal at mine tipples and the distribution of cars to such mines, to supersede all [fol. 57] then existing rules, which were far from uniform. Rule 2 of this circular provided that:

> Copies of orders for cars from a mine that is joint with any other carrier (steam, electric or water) shall be filed with the designated representative of each such carrier. Such combined requisitions must not exceed the gross rating of the mine.

This circular was reissued as Circular CS-31 Revised, effective January 10, 1920. Rule 2 became rule 4 of the revised circular, but contained no change. This rule, which prohibits the operator from ordering cars in excess of the gross daily rating of the mines, was a radical departure from the rule prescribed for the Illinois Central in the Illinois case. It was apparently accepted by the operators as a war measure, and because the roads were being operated as a unit

under Federal control. Until September, 1919, when a car shortage developed, the mines had all the cars and business that they could take care of, and the effects of rule 2 later rule 4, were not fully apparent until that time. From January to November, 1920, the carriers were unable to meet the demand made upon them for empty coal cars.

Federal control of the railroads terminated March 1, 1920. The transportation act, 1920, approved February 28, 1920, brought paragraph (12) into section 1 of the interstate commerce act, in part as follows:

> It shall be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine.

[fol. 58] On March 2, 1920, in a notice to carriers and shippers we recommended that until experience and further study demonstrated that other rules would be more effective and beneficial the uniform rules prescribed in Car Service Circular CS-31 Revised, be continued in effect. This notice was supplemented by a further notice to carriers and shippers dated April 15, 1920, modifying the previous recommendation in certain respects not here material.

In June, 1920, owing to the peculiar conditions existing in Indiana, the carriers in that State began to distribute cars under what is known as the "round robin rule." This contemplated the running of certain mines full time on days when there was a car supply sufficient to give but a part of the mines full running time, and shutting down others, equalizing the time between all the various mines in the current or succeeding months. This practice was agreed to by the operators.

The complainants herein are directed against the last sentence of rule 4 of Circular CS-31 Revised, which limits the joint-mine orders for cars from all the carriers to the gross daily rating of the mine. The whole subject of the ratings of coal mines, other than anthracite, and the distribution of cars between them in times of short car supply, is pending before us in another proceeding. While there may be local variations in method of application, the general basis of ratings may be stated in substance.

The rating of a local mine is determined by taking the total tonnage shipped by the mine during the preceding month over the carrier serving the mine dividing it by the number of hours worked in producing it, and multiplying the quotient by the number of hours in the recognized workday (not more than 10 hours) of the individual mine. A rating so determined is called the daily rating, as distinguished from the gross daily rating which applies to a joint

mine, and which is determined in a similar manner, but by taking the total tonnage shipped over the lines of all the carriers serving the mine.

Complainants contend that a joint mine is entitled to the same pro rata distribution of cars from each carrier as the local mines on each of the carriers serving it. They claim that each carrier is [fol. 59] under a legal obligation to give equal service to all mines located upon its lines. They do not demand the full measure of that which they consider as their due, the legal right to order cars from each carrier based upon the gross daily rating of the mine, but ask that we restore the rule prescribed for the Illinois Central in the Illinois case, with the limitation that in no case should cars be furnished to such joint mine in excess of its gross daily rating.

Certain joint mines in Illinois and Indiana have expended large sums to secure connections with more than one road. This is not true as to all of the joint mines. The evidence seems to establish the fact that it was the desire of the carriers to secure coal traffic, particularly in the southern Illinois coal field, which led to arrangements being made by them for ingress to large mines; either by building into such mines or by means of trackage agreements or switching-absorption arrangements. In instances of this kind it not infrequently happens that the joint mine builds and maintains its own switch tracks and maintains its own locomotives to perform the necessary switching service. The location of the joint mines in the New River and Fairmont districts, and the manner in which service is accorded those mines, are fully set forth in our report in the Fairmont cases, and need not be repeated here.

It is admitted by all that the joint mine enjoys advantages not possessed by the local mine, and has the right to so place its orders as to avoid, if it can, embargoes and congestion of traffic on particular roads. It has available a more extensive and more varied market for its coal. It may at times be able to dispose of its product upon the second line of railroad, while the mine local to the first road is unable to market its output. In case of car shortage the joint mine is able to select the outlet which affords the best and most liberal means of transportation. These are important advantages to which the joint mine is entitled and in the reasonable enjoyment of which it should be protected.

Complainants urge that under rule 4, here attacked, the natural advantages of the joint mine are not recognized in the distribution of cars. They say that the rule does not give the joint mine any [fol. 60] advantages in this respect when, due to the development of its markets and the contracts which it has assumed, it must, of necessity, ship over lines other than the one having the greater car supply. Under the present rules a joint mine can receive as great a number of cars as the local mine located on the line having the greater car supply by confining its orders exclusively to that line. Complainants contend that rule 4 has had the effect, therefore, of limiting their distribution to markets on one railroad only. With this contention we are unable fully to agree. Whenever the joint mine orders cars from the different carriers serving it, it is doubtless

due to other compensating advantages which outweigh those of a temporary greater car supply, and such election is the voluntary choice of the shipper.

The operation of rule 4 is shown by the following example: A joint mine with a gross daily rating of 50 cars located on carriers A and B orders all its cars from carrier A, which has an 80 per cent car supply. The joint mine will receive the same number of cars as a local mine with a daily rating of 50 cars on carrier A. However, if carrier B has a 50 per cent car supply and the joint mine divides its order equally between the two carriers, it will receive 80 per cent of 25 cars, or 20 cars, from carrier A, and 50 per cent of 25 cars, or 12.5 cars, from carrier B, a total of 32.5 cars compared with 40 cars received by the local mine on carrier A. Should the joint mine order more than half its cars from the carrier with the greater car supply this will change the figures somewhat, but in no instance will the joint mine receive as many cars as the local mine served by carrier A if the orders are divided. The complainants concede that the joint mine will, in the aggregate, receive more cars than the local mine located on the carrier with the lesser car supply, and it possibly may receive more cars on the average than the local mines of similar rating on both carriers.

In Ridge Coal Mining Co. vs. M. P. R. R. Co., 62 I. C. C., 259, 262, we said:

* * * the actual or constructive location of the competing mines upon two or more lines of railroad substantially differentiates [fol. 61] their situation from that of the complainant's local mine; and that the preference and advantage over the complainant which such competing mines enjoy by reason of service by two or more lines is not undue.

During September, 1919, the daily ratings of joint and local mines on the Illinois Central (St. Louis division) were 1,845 and 801 cars, respectively. On this basis, under Circular CS-31 Revised, the joint mines would have been entitled to 69.7 per cent of the 23,042 cars delivered by the Illinois Central to all mines on its St. Louis division during that month, or 16,060 cars, if they had confined all their orders to that railroad. By dividing their orders for cars they received 4,068 cars less than they otherwise would have received. Under the rule of the Illinois case the daily rating of these joint mines on the Illinois Central during the same month would have been 1,106 cars, or 57.9 per cent of the total ratings of all mines, provided the orders for cars were divided among all the carriers serving the joint mines. On this basis the joint mines would have been entitled to 13,341 cars, or 1,349 cars more than they actually received. During October, 1919, using the same basis, the joint mines would have received 6,532, or 2,742 cars, respectively, less than they actually did receive, while during August, 1920, the deficiencies would have been 6,968, or 4,272 cars, respectively. Joint mines on the Missouri Pacific and Eastern Illinois would likewise have received substantially fewer cars. While the Burlington's car supply during the periods

covered by the complaint in No. 12,362 was better than that of other roads, complainants for comparative purposes used the Illinois Central figures for the reason that the Burlington did not operate under the rule prescribed in the Illinois case. Complainants in Nos. 12,362 and 12,399 have submitted no statement as to the relative car supply furnished joint mines and local mines during any period.

Interveners have introduced as exhibits statements which compare the car supply at joint and local mines in southern Illinois during certain months. In September, 1919, the local mines in [fol. 62] Franklin, Williamson, Perry, and Gallatin Counties were furnished cars on an average equivalent to 73.3 per cent of their mine ratings, while the joint mines in the same counties during the same month were furnished cars on the average equivalent to 84.6 per cent of their mine ratings. From this interveners argue that since the joint mines already have an advantage, it can not be found that they are prejudiced under the application of rule 4. This conclusion does not follow. The exhibit shows that the Burlington, which during this month had the best car supply, served only 6 of the 30 local mines, but served 23 of the 35 joint mines, and that the joint mines in each case ordered by far the greater portion of their cars from that road. It follows that the joint mines would secure a greater percentage of cars on the average than the local mines, the great majority of which are on the roads with a lesser car supply. If the joint mines had confined their entire order to the road with the best car supply the percentage in favor of the joint mine would have been somewhat increased.

During 1920 cars left over in the New River district at local mines on the Chesapeake & Ohio averaged 8.2 per cent of cars placed, while those left over at joint mines averaged 11.4 per cent of the number placed. On the Virginian the cars left over at joint mines were slightly in excess of those left over at local mines, due in part to the physical and operating conditions on what was formerly the White Oak Railway. A witness for the Chesapeake & Ohio testified that the question of left-over cars was largely a matter of policing, and that if proper information were given to each railroad regarding the order and supply of cars there would be no occasion for cars being left over at joint mines to a greater extent than at local mines. Rule 4, in the opinion of the witness, does not require that all lines serving joint mines be supplied with such information as would make overordering impracticable and thus provide a full utilization of the empty equipment available from day to day.

The evidence indicates that in times of car shortage mine ratings, both local and joint, become inflated an average of 33⅓ per cent. The mine which has the means of more consistently securing as [fol. 63] much as or more than 75 per cent of its daily rating will have more cars left over than another mine which does not possess such means. Therefore to permit of a further inflation of 50 per cent for the purpose of ordering cars would result in a waste of equipment unless some means are devised to prevent overrating of the mines. Witnesses for the joint mines stated that if the carriers would advise the operators each day as to the probable available car

supply no more cars would be ordered than could be loaded in one day. Information of this kind should be conveyed to the operators of both joint and local mines.

Interveners contend that unless an order for cars for the transportation of coal be accompanied by a bona fide tender or setting aside of the coal to be transported, it is not a reasonable request for transportation within the meaning of paragraph (4) of section 1 of the Interstate Commerce Act. For example, if the gross daily rating of a mine is 200 tons, interveners contend that it would be unreasonable to say that the mine, for the purpose of ordering cars, should be in a position of tendering 300 tons to the carriers serving it and to secure its pro rata share of cars on that basis.

Interveners further contend that the first sentence of paragraph (12) of section 1 requires every carrier, during periods of car surplus, to make a just and reasonable distribution of cars among the mines served by it or customarily dependent upon it for car supply, and leaves the question of what is a just and reasonable distribution of cars to the discretion of the carrier or to us upon complaint and after full hearing, while the second sentence of paragraph (12) specifies the particular manner in which the cars are to be distributed during periods of car shortage and leaves nothing regarding the distribution either to the discretion of the carrier or to us. This sentence does not use the term "distribution," but interveners argue that to maintain and apply just and reasonable ratings and to count each and every car furnished to or used by any such mine for transportation of coal against the mine is a mandatory rule of law requiring an exact pro rata distribution of cars in accordance with the prescribed ratings, whether the mine be served by one or more carriers. In view of our conclusions herein, and because the interpretation of paragraph (12) is before us in another proceeding [fol. 64] now pending, we will not pass upon that contention here.

Upon the present record and in the light of instant conditions we are not disposed to extend the principle laid down in the Illinois case, which was intended as a limitation upon the practice of the respondent in that proceeding. Ten years have elapsed since our decision in that case, and we now have a considerable experience with the results of the practice inaugurated by the carriers following our determination, as well as a broader record. We have indicated in proceedings of this character that the principle of stare decisis has no application, and that our determinations as to what will for the future be just and reasonable must meet changed conditions and wider knowledge, as developed by the passage of time. Hillside Coal & Coke Co. vs. P. R. C. Co., 19 I. C. C., 356, 361. Indeed, in passing upon the mine-rating feature of the Illinois case, we indicated in the report at page 295, that we did so only upon the facts and under the conditions there presented, and that our determination in approving the basis presented was not to be understood as indicating approval of its adoption in places where it would not suitably and properly meet the conditions, or where it would be objectionable to the great majority of those affected thereby. In important particulars the present record presents new aspects to us.

There have been important developments in the coal industry, not then in contemplation. The superior advantages of the joint mine over its local competitor, in part flowing from the decision in the Illinois case, have resulted in a proportionately greater development of the industry at points where mines may be served by two or more carriers rather than by but one. A duplication of trackage and of trackage rights has followed in numerous instances. The practice indicated in the Illinois case seems, in certain instances, to result in a waste of car-days which in view of the effects of recent and present car shortages should be avoided. There has been extreme dissatisfaction in the ranks of mine labor, accentuated, in any event, by inequalities in opportunities for working time and wages. The results of such disturbed labor conditions have been harmful to the carriers and to shippers. Whatever tends to inflate the nominal [fol. 65] mine ratings beyond the amount which can normally be produced and shipped is distinctly counter to the public interest. We had before us in the Illinois case other objections, not then considered determinative, but which we may fairly consider as still existent.

The present facts considered, we do not conclude upon these records that the rule attacked, rule 4 of Circular CS-31 Revised, is in principle unreasonable or unduly prejudicial. Our former conclusions in the Fairmont case, based upon a mistaken adherence to and extension of the decision in the Illinois case, are reversed. The present decision is of course without prejudice to such determination of the questions before us in the general proceeding indicated as involving the mine rating and car-distribution rules as the record may there require. The complaints herein will be dismissed, and we will enter an order to that effect.

POTTER, Commissioner, dissenting:

I favor the application of the rule of the Illinois case. To do otherwise is in my judgment to deprive of valuable advantage of location and destroy absolute right under the law. It seems to me the majority report tends to make law rather than apply and enforce it. I think a joint mine has the right to be regarded by each road as though that road were the only road serving it. It loses no right from one when another reaches it. It should receive pro rated equipment from each road based on the traffic which it tenders to that road in proportion to the traffic tendered by other mines. The volume to be considered as its tender to a particular road is its rated output less the tonnage to be shipped by other lines. The rule of the Illinois case in application recognizes a mine's rights and affords method to work them out with substantial justice in a practical manner. If opportunity to ship over more than one road gives a joint mine an advantage in being able to furnish to labor more nearly continuous employment, that advantage belongs to the mine because of the superior transportation service available to it. We may not restrict the use of transportation facilities in order to [fol. 66] equalize mine operation. To do so would be to require discrimination in the use of equipment—not remove it. If a local

mine is at a disadvantage it is not because of a transportation problem with which we may deal but because of a labor supply problem which is not for us. It is by no means certain that the application of the rule of the Illinois case affects labor injuriously or tends to disturb the adjustment.

[fol. 67] Order

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 11th Day of December, A. D. 1922

No. 12362

Bell & Zoller Coal Company et al.

v.

The Baltimore & Ohio Southwestern Railroad Company et al.

No. 12399

Vigo Mining Company et al.

v.

The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company et al.

No. 12081

Fairmont & Cleveland Coal Company

v.

The Baltimore & Ohio Railroad Company

No. 12082

Fairmont & Cleveland Coal Company

v.

The Monongahela Railway Company

No. 12083

New River Company et al.

v.

The Virginian Railway Company

No. 12084

New River Company et al.

v.

The Chesapeake & Ohio Railway Company

These cases being at issue upon complaints, answers, and intervening petitions on file, and having been duly heard and submitted

by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of facts and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the complaints in these proceedings be, and they are hereby, dismissed.

By the Commission.

George B. McGinty, Secretary. [Seal.]

[fol. 68] District Court of the United States for the Southern District of West Virginia

[Title omitted]

Supplemental Bill

That the complainants, The New River Company, White Oak Fuel Company, Stuart Colliery Company, Dunnloop Coal & Coke Company, Beckley Coal & Coke Company, Mabscott Coal and Coke Company and Cranberry Fuel Company, filed, on or about January 29, 1923, in this Honorable Court their original bill of complaint against The Chesapeake and Ohio Railway Company, The Virginian Railway Company, The United States of America and the Interstate Commerce Commission, for the purpose of securing an adjudication and decree that a decision, order and ruling of the Interstate Commerce Commission of December 11, 1922, and a certain rule put into effect in accordance therewith, known as Rule 4 of Circular CS-31 Revised, were without warrant of law and null and void and that the same be set aside and annulled; also praying for a suspensory order, a temporary injunction and a permanent injunction re-
[fol. 69] straining and enjoining the defendants from restricting, in accordance with said decision, ruling and order and said Rule 4, the transportation service in interstate commerce of the defendant carriers to the complainants, and for other relief, all as set forth in said bill of complaint.

That in article XVI of said bill your complainants alleged that the Interstate Commerce Commission had failed to take any action on a petitioin of the complainants filed with the Interstate Commerce Commission to reopen the proceedings in which said decision was rendered and said rule and order issued, and that said decision, ruling and order and said Rule 4 continued to be in full force and unmodified.

That the complainants hereby further show, by way of supplement:

That on February 5, 1923, since the filing of said original bill, the Interstate Commerce Commission entered an order denying said petition to reopen said proceedings.

The New River Company, White Oak Fuel Company, Stuart Colliery Company, Dunnloop Coal & Coke Company, Beckley Coal & Coke Company, Mabscott Coal & Coke Company, Cranberry Fuel Company, by James W. Carmalt, August G. Gutheim, Addison C. Burnham, Their Attorneys.

[fol. 70] AT A DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ORDER AND NOTICE OF HEARING—Filed Jan. 29, 1923

Bill of complaint in Equity in the above entitled proceedings having this day been presented to this Court by the complainants by James W. Carmalt, their attorney in said cause, and application for hearing thereon before three judges as provided in 38 Stat. L. 219, having at the same time been made;

And the said Bill of Complaint and application for hearing upon those prayers of the Bill of Complaint, asking for temporary restraining orders and interlocutory injunctions having been duly considered;

It is ordered that said Bill of Complaint be filed in this Court;

It is further ordered that hearing upon said application be set at the Court Rooms of the United States District Court for the District of Virginia, at Richmond, Virginia, at 10 o'clock A. M. Tuesday, February six, 1923;

It is further ordered that copy of this order together with copy of said Bill of Complaint be served upon each defendant in said cause;

And it is further ordered that service of this Order and of said Bill of Complaint upon said defendants, shall constitute the notice of hearing as in said statute provided.

[fol. 71] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

MOTION TO DISMISS ORIGINAL BILL

Comes now the United States of America, one of the defendants in the above entitled cause, by its counsel, and moves the court to dismiss the bill of complaint herein for want of jurisdiction, at complainants' cost, because:

1. The suit is not a suit against the United States to annul and enjoin an order of the Interstate Commerce Commission, pursuant to the Commerce Court Act of June 18, 1910, ch. 309, 36 Stat. 539, and the Urgent Deficiencies Act of October 22, 1913, ch. 32, 38 Stat. 219-221, but is obviously a suit against certain common carriers to enjoin them from putting into force and effect a certain rule adopted by the carriers.

2. The order entered December 11, 1922, by the Interstate Commerce Commission, which complainants seek to have annulled, enjoined and declared void, is a negative order.

3. The bill of complaint seeks to invoke the jurisdiction and authority of the court in a controversy between complainants and the defendant carriers which has heretofore been submitted to, heard and determined by the Interstate Commerce Commission, to the end and in the hope that the court will substitute its jurisdiction for [fol. 72] that of the Commission with respect to a matter committed to the exclusive jurisdiction of the said commission.

4. It appears from the bill of complaint (Par. XVI) that the matters complained of and against which relief is sought are now pending before the Interstate Commerce Commission upon the application for rehearing filed by complainants and others.

5. The matters complained of and concerning which relief is sought have been submitted to and adjudicated by the Interstate Commerce Commission, which is charged by law with the determination of such matters. The order made by the said commission was made in the exercise of judgment and discretion in a matter within its sole jurisdiction and hence cannot be reviewed or controlled by the courts.

Therefore, defendant prays that its motion be sustained.

Elliott Northcott, United States Attorney. H. L. Underwood, Attorney. Blackburn Esterline, Assistant to the Solicitor General.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

MOTION TO DISMISS AMENDED BILL, ETC.

Comes now the United States of America, one of the defendants in the above entitled cause, by its counsel, and, without waiving its motion heretofore filed to dismiss the bill of complaint for want of [fol. 73] jurisdiction, but at all times, now and hereafter, standing and relying thereon, moves the court to dismiss the amended and supplemental bills of complaint herein for want of equity and because the said bills do not state facts sufficient to entitle the complainant to the relief sought therein, or to any part thereof, or to any relief in equity.

Elliott Northcott, United States Attorney. H. L. Underwood, Attorney. Blackburn Esterline, Assistant to the Solicitor General.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

MOTION TO DISMISS ORIGINAL BILL

Now comes the Interstate Commerce Commission, one of the defendants in the above entitled suit, hereinafter called the Commission, and moves the court to dismiss, as to it, the bill of complaint in said suit upon the grounds that:

1. The bill of complaint does not contain statements or allegations of fact which entitle the complainants or any of them to the relief or any of the relief prayed for by complainants in and by said bill of complaint.

2. The Commission's order of December 11, 1922, which is in-
[fol. 74] cluded in Appendix C to the bill of complaint, and wherein and whereby the Commission denied the relief asked for by complainants in certain proceedings before the Commission, mentioned in the bill of complaint, and dismissed their complaints, is a negative order within the meaning of the ruling of the Supreme Court of the United States in Procter & Gamble Company v. United States, 225 U. S. 282, and therefore an order over which this court may not properly exercise jurisdiction.

3. The Commission's report, included in said Appendix C, which is referred to in the bill of complaint as the Commission's "decision and ruling", does not contain any order or requirement, and therefore this court does not possess jurisdiction which enables it to comply with complainant's request to annul and set aside said report.

P. J. Farrell, For Interstate Commerce Commission, Defendant.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

MOTION THAT THE MOTION TO DISMISS THE ORIGINAL BILL BE TAKEN AS APPLYING TO THE BILL AS AMENDED AND SUPPLEMENTED

Now comes the Interstate Commerce Commission, one of the defendants in the above-entitled cause, and moves this court that its motion to dismiss the original bill of complaint herein be taken and considered as a motion to dismiss the bill of complaint herein, as finally amended and supplemented.

J. Carter Fort, For the Interstate Commerce Commission.

[fol. 75] At a District Court of the United States for the Southern District of West Virginia

[Title omitted]

Order Suspending Decision and Ruling of I. C. C., etc.—Filed Feb. 8, 1923

This cause having come on to be heard on the 6th day of February, 1923, on the prayer for a temporary stay or suspension of the operation of the decision, ruling and order of December 11th, 1922, issued by the Interstate Commerce Commission in the cause before said Commission, No. 12083, New River Company, et al. vs. The Virginian Railway Company, and No. 12084, New River Company, et al. vs. The Chesapeake and Ohio Railway Company, and of Rule 4 of Circular C. S.—31 (Revised), as referred to and described in the Bill of Complaint in this cause, and having, after due notice, been heard by three judges, to-wit: Hon. C. A. Woods and Hon. Edmund Waddill, Jr., Circuit Judges, and Hon. Geo. W. McClintic, District Judge, duly convened for said hearing, all parties defendant being represented at said hearing by their attorneys; said cause having been heard and having been argued by all parties, all after due notice, and evidence having at said hearing been submitted that irreparable damage would result to the complainants unless the operation of said decision, ruling and order and of said Rule 4 were stayed and suspended, which said evidence has been transcribed and identified with reference hereto;

[fol. 76] It is found, ordered, adjudged and decreed, two of said judges concurring herein, as follows:

1. It is found that irreparable damage would result to the complainants unless the operation of said decision, ruling and order and of said Rule 4 is suspended and stayed; that the nature of said damage is that unless the operation of said ruling, order and Rule 4 is stayed and suspended the transportation facilities for the shipment of coal produced by the complainants will be so reduced that it will be impossible for the complainants to fulfill their deliveries on existing contract obligations for the delivery of coal; that the complainants' labor organization, gradually built up through a period of time, will be disrupted and disorganized; that complainants will suffer injury to the good will of their business and loss of present and future business; that the complainants' plant and equipment will become in part idle; that the returns on the lessened amount of coal which the complainants will be able to ship will be unable adequately to carry the overhead charges of the complainants' plants and of their business, and that the cost of the coal produced by the complainants will be increased to a large amount per ton.

2. It is ordered, adjudged and decreed, That the operation of said decision, ruling and order of December 11, 1922, of the Interstate Commerce Commission and of Rule 4 of Circular C. S.—31 (Revised)

be stayed and suspended for a period of sixty days from the date of this order, pending the application for an injunction.

This order shall not become effective until the complainants, or some one of them, or some one for them, shall enter into a bond, payable to the United States of America, before the Clerk of this Court, with proper Surety ,to be approved by the Judge thereof, in the penalty of $100,000.00, conditioned according to law.

It is ordered that the evidence of S. A. Scott, taken before the [fol. 77] Court and transcribed by a stenographer, be and the same is here filed as part of the record of this cause.

Enter above order.

Geo. W. McClintic, D. J. Edmund Waddill, Jr., Judge Circuit Court. Richmond, Va., February 8, 1923.

I dissent. See Memorandum to be attached. C. A. Woods, Circuit Judge.

[fol. 78] At a District Court of the United States for the Southern District of West Virginia

[Title omitted]

Order Allowing the Answer of the Virginian Railway Company to be Filed—Filed Feb. 16, 1923

On motion of The Virginian Railway Company, by Counsel, leave is granted it to file its answer in this cause, and the same is accordingly this day filed.

[fol. 79] In the District Court of the United States for the Southern District of West Virginia

[Title omitted]

The Separate Answer of the Virginian Railway Company

This respondent, reserving to itself the benefit of all just exceptions to the Bill of Complaint in this proceeding, for answer thereto, or to so much thereof as it is advised that it is material for it to answer, answers and says:

I. This respondent admits that the objects sought to be accomplished by the Complainants in this case are as set out and alleged in paragraph one of the Complaint.

II. This respondent admits the allegations of paragraphs two, three, four, five, six and seven of the Complaint.

III. This respondent admits the allegations of paragraph eight of the Complaint, in so far as the same correctly recites the language of the several sections of the Interstate Commerce Act which it purports to set out, but no further.

[fol. 80] IV. This respondent admits the allegations of paragraphs nine, ten, eleven, twelve, thirteen and fourteen of the Complaint.

V. This respondent admits the allegations of paragraph fifteen of the Complaint, that it has put into force, and has so notified the Complainants, effective Feb. 1st, 1923, Rule 4 of Circular CS-31, Revised, not because of fear and duress of the penalties that might be imposed by law, but because this respondent considers that said decision of the Interstate Commerce Commission imposed upon it an obligation to put said Rule into effect within a reasonable time after the same was rendered.

VI. The allegations of paragraph sixteen of the Complaint are admitted.

VII. This respondent admits the allegations of paragraph seventeen of the Complaint as to the large capital investment required for the operation and development of the Complainants' shaft mines, and of the large overhead charge connected with their operation.

It neither admits nor denies the allegations as to the various reasons and factors which entered into the locations of Complainants' mines and railroads, and the geographical location thereof in relation to respondent's railway and that of The Chesapeake & Ohio Railway Company.

[fol. 81] It admits the allegations of said paragraph as to the leasing of said White Oak Railway and Piney River and Paint Creek Railroad by The Chesapeake and Ohio Railway Company and by this respondent, and of the subsequent purchase of the same by The Chesapeake and Ohio Railway Company and this respondent, and of the granting of reciprocal trackage rights for a period of ninety-nine (99) years; and it further admits the allegations of said paragraph as to the ownership by The New River Company of the stock of the White Oak Railway Company and of the Piney River and Paint Creek Railroad Company.

This respondent does not admit the allegations of said paragraph as to the motives of Complainants for the sale of said White Oak Railway and the Piney River and Paint Creek Railroad, and respondent avers that the said lease, purchase, and the trackage agreements with The Chesapeake and Ohio Railway Company mentioned were made, so far as this respondent is concerned, solely in order to immediately increase its coal traffic, and as a preferable alternative to the construction of new lines paral-e/ling to some extent the existing lines of The Chesapeake and Ohio Railway. It is admitted that the proposed agreement of purchase and sale, and the Trackage Agreement with The Chesapeake and Ohio Railway Company were submitted to the Interstate Commerce Commission, which made no objection thereto.

This respondent does not admit the allegations of law as to the legal effect of the said agreement entered into between The Chesapeake and Ohio Railway Company and this respondent, as set out in the two concluding sentences of said paragraph seventeen of the Complaint, and does not consider that it is called upon to answer the same.

[fol. 82] VIII. In answer to paragraph eighteen of the Complaint, this respondent states that due to conditions brought about by no fault of its own it has not been able in the recent past to completely fill the orders for coal cars placed with it by the Complainants and other coal operators on its line of railroad.

IX. This respondent neither admits nor denies the allegations of paragraph nineteen of the Complaint, but calls for proof of the same; and in further answer thereto this respondent says that in periods of car shortage, and said Rule 4 of CS-31, Revised, only applies at such times, it is admitted that the Complainants will probably not receive as many cars as their orders will call for.

X. This respondent neither admits nor denies the allegations of law, nor the legal effect of the said decision, ruling and order, of the Interstate Commerce Commission in the Bell & Zoller decision rendered on December 11th, 1922, as set out in paragraphs twenty-one, twenty-two, twenty-three, twenty-four and twenty-five of the Complaint, and submits that it should not be called upon to answer said allegation of law and the legal effect of said decision, nor to answer the arguments of Complainants contained in said paragraphs.

[fol. 83] XI. This respondent neither admits nor denies the allegations of law contained in paragraphs twenty-six and twenty-seven of the Complaint, nor does it consider that it should be called upon to answer the same.

XII. This respondent, having no knowledge of the allegations of paragraphs twenty-eight and twenty-nine of the Complaint, neither admits nor denies the same.

XIII. And for further answer to said Bill of Complaint this respondent says that in the matter of the distribution of its supply of coal cars to the mines of the Complainants, and other coal mines on its lines of railroad, it is subject to the orders, rules, and decisions of the Interstate Commerce Commission; that the Interstate Commerce Commission having, in its said decision in the Bell & Zoller case, decided that said Rule 4 of Circular CS-31, Revised, is not in principle unreasonable or unduly prejudicial, and in the same decision having expressly reversed its conclusions in the Fairmont case and distinguished the Illinois case, this respondent considers that it was legally bound to put into effect on its railroad said Rule 4, of Circular CS-31, Revised, in the distribution of its supply of cars to the coal mines on its line. And this respondent denies that in the distribution of its coal cars it has discriminated against said Complainants, or any other shipper, nor has it in any other manner

[fol. 84] violated the law in connection therewith, but at all times has conducted its business as a common carrier strictly in accordance with law, and the orders, rulings, and decisions of the Interstate Commerce Commission.

And now, having fully answered, this respondent prays that it may be hence dismissed with its costs.

The Virginian Railway Company, By C. H. Hix, Vice-President. Attest: H. Clement, Assistant Secretary. (Seal.)

Affidavit of C. H. Hix to above paper omitted in printing.

[fol. 85] At a District Court of the United States for the Southern District of West Virginia

[Title omitted]

Order Allowing Answer of C. & O. Ry. Co. to be Filed

This day came the Chesapeake & Ohio Ry. Co. by counsel, Fitzpatrick, Brown & Davis, and tendered its separate answer and the same is ordered filed, which is accordingly this the seventeenth day of February done.

[fol. 86] In the District Court of the United States for the Southern District of West Virginia

[Title omitted]

Answer of the Chesapeake and Ohio Railway Company

The Chesapeake and Ohio Railway Company herein answers a bill of complaint filed against it and others in the United States District Court for the Southern District of West Virginia by the New River Company and others, reserving to itself the benefit of all just exceptions to said bill of complaint.

1. For many years prior to Federal control and during Federal control from January 1st to October 10th, 1918, the mine rating and car distribution rules of Respondent, The Chesapeake and Ohio Rail-[fol. 87] way Company, hereinafter termed the "Chesapeake," applicable during car plenty and car shortage periods, made no distinction between so-called joint mines, i. e., mines served by both the "Chesapeake" and The Virginian Railway Company, hereinafter termed the "Virginian," and so-called local mines, i. e., mines served by the "Chesapeake" solely. Under these rules each mine served by it was rated in 50 ton cars by the "Chesapeake" in accordance with its daily capacity to produce and ship coal over the "Chesapeake." A joint mine having the same rated capacity as a local mine

was furnished daily by Respondent the same number of cars furnished a local mine of the same rated capacity the same day. The fact that a joint mine was served by the "Virginian" was given no consideration by your Respondent in the distribution of its cars.

II. Effective October 10, 1918, the United States Railroad Administration, operating as a unit the transportation systems in the United States for the Federal Government, abolished the distinction a common law and under the provisions of the Interstate Commerce Act, which theretofore had existed between joint mines served by independent competing carriers and local mines served by one carrier, by the issuance of Circular C. S.-31, referred to in Article X of the Bill of Complaint. By this circular cars were distributed to joint mines as though furnished by one carrier.

III. For example, prior to October 10, 1918, a mine jointly served by the "Chesapeake" and the "Virginian" and rated by the "Chesapeake" at 50 cars, was privileged to order 50 cars from the Chesapeake without regard to the number of cars ordered from the [fol. 88] "Virginian," and to supply cars without regard to the number of cars supplied by the "Virginian." Thus, on a day when the "Chesapeake" had a 50 per cent. car supply it could under its rules furnish the joint mine 25 cars, precisely the same number it could furnish a local mine served solely by the "Chesapeake" of the same rated capacity, to-wit: 50 cars.

On the same day it is entirely possible for the same mine served also by the "Virginian" to receive 25 cars from the "Virginian." Thus, the joint mine could secure a total of 50 cars, or twice as many from the "Chesapeake" and "Virginian" together as a local mine on the "Chesapeake" or "Virginian" received that day.

Beginning October 10th, 1918, under Rule 2 of Circular C. S. 31, the same 50 car joint mine in ordering from both carriers could not order in excess of 50 cars from the two carriers combined. Thus, a 50 car joint mine ordering 25 cars each from the "Chesapeake" and the "Virginian" on a day when each railroad had a 50 per cent car supply could receive 12-1/2 cars from each carrier, a total of 25 cars from both carriers, the same number of cars that the "Chesapeake" local mine rated at 50 cars could receive from the "Chesapeake" alone.

IV. Effective January 10, 1920, the United States Railroad Administration, Chesapeake and Ohio Railroad, issued Circular C. S. 31 (Revised), superseding Circular C. S. 31, copy of which is filed with Bill of Complaint, Appendix A. By this circular no change was made in the joint mine rule, Rule 2 of Circular C. S. 31 being republished as Rule 4 of Circular C. S. 31 (Revised.)

V. With the resumption of private control, March 1, 1920, on [fol. 89] the recommendation of the Interstate Commerce Commission, hereinafter termed the Commission, dated March 2, 1920, referred to in Article XI of the Bill of Complaint, Respondent made no change at that time in Rule 4 of Circular C. S.-31 (Revised).

VI. Complainants thereupon informally petitioned the Commission to authorize the "Chesapeake" and the "Virginian" to restore the joint mine practice of these carriers in effect prior to Circular C. S.-31. The Commission refused to act on informal complaint, advising petitioners that their remedy was through formal complaint.

VII. Thereupon Complainants filed formal complaint with the Commission against the "Chesapeake" and the "Virginian" severally, alleging that Joint Mine Rule 4 as published in Circular C. S.-31 (Revised) then in effect was unreasonable and unduly preferential and prejudicial. The Commission decided in Fairmont and Cleveland Coal Company against The Baltimore and Ohio Railroad Company, 62 I. C. C. 269, that Rule 4 of Circular C. S.-31 (Revised) was unreasonable and unduly preferential and prejudicial, and found the reasonable, non-preferential and non-prejudicial rule to be the rule prescribed by the Commission in "In re Irregularities in Mine Ratings," 25 I. C. C. 286, commonly known as and hereinafter termed the Illinois rule.

By the Illinois rule, on days when a "Chesapeake" and "Virginian" joint mine ordered cars from both carriers, it could be given cars by each carrier based upon 75 per cent of its rated capacity. [fol. 90] provided, however, that the total cars supplied by both carriers should not exceed the rated capacity of the mine.

For example, the joint mine rated at 50 cars per day could order 37½ cars from the "Chesapeake" and 37½ from the "Virginian," and with a 50 per cent car supply on each railroad could be supplied with 18.75 cars by each carrier, a total of 37.5 cars, whereas the local mine on the "Chesapeake," with a 50 car rated capacity, could receive 25 cars, and a local mine on the "Virginian," with the same rated capacity, could receive 25 cars.

VIII. The Illinois rule was prescribed by the Commission in 1912 as applicable to the Illinois Central Railroad Company, and it is believed the rule had been in force on the Illinois Central and other railroads between that date and October 10th, 1918. As stated in Article I, the "Chesapeake," believing that joint mines were entitled to the same treatment as local mines of similar rating, never published the somewhat restrictive Illinois rule until required to do so by the decision of the Commission in the Fairmont case, supra.

IX. In its decision in the Fairmont case, supra, the Commission issued no formal order requiring your Respondent to publish the Illinois rule, contenting itself in its decision with laying down the Illinois rule as the rule of law applicable to the furnishing of cars to joint mines served by two or more carriers, and while the Com- [fol. 91] plainants contended to your Respondent that the Illinois rule would not operate to give them the full number of cars they were legally entitled to from your Respondent, in a spirit of compromise they accepted the decision.

Among other things, the Commission said in the Fairmont decision, supra:

"Following the views expressed in that case, and upon this record, we find that Rule 4 of Circular CS-31 Revised, is unreasonable and unduly prejudicial to joint mines and unduly preferential to local mines to the extent that it limits the aggregate orders of the joint mine to 100 per cent. of its rating from both roads; and that for the future during periods of car shortage defendant should distribute cars to the joint mines on their lines here considered on the basis outlined in the Illinois case, namely, on days when the joint mine orders cars from only one carrier it shall have cars based upon its full rating from that carrier, and on days on which it orders cars from both carriers its rating on each of such carriers shall be 75 per cent of its full rating, subject to the limitation that it shall on no day be supplied with cars in excess of its maximum rating."

Respondent thereupon published the Illinois rule in its Supplement No. 1 to Circular C. S.-31 (Revised), effective September 17, 1921, copy of which is hereto attached, marked Appendix No. 1. This is the rule automatically continued in force by the restraining order entered by this Court on February 9th, 1923.

X. Prior to its decision in the Fairmont case, supra, formal proceedings had been filed with the Commission, under the style of Bell & Zoller Coal Company, et al. vs. Baltimore & Ohio Southwestern [fol. 92] Railroad Company et al., involving identically the same question involved in the Fairmont case, supra. Some time after Respondent had published the joint mine rule in Supplement No. 1 to Circular C. S.-31 (Revised) in response to the decision of the Commission in the Fairmont case, the Commission reopened the Fairmont case and consolidated it for argument with the Bell & Zoller proceeding.

As the Commission had issued no formal order in the Fairmont case, supra, requiring Respondent to cease and desist publishing the local mine rule as shown in Circular C. S.-31 (Revised) and in lieu thereof to publish the Illinois rule, stating in the decision:

"We have not required that car service rules be filed as tariff schedules. We will not in this proceeding direct that the rules which we herein find to be reasonable be so filed. *We shall expect, however, that defendants will promptly amend their car service rules so as to conform with our findings* and evidence same by filing copies thereof with us." (Italics ours).

there was no formal order of the Commission to be vacated when the Fairmont case, supra, was reopened and consolidated for argument with the Bell & Zoller case, supra. In the belief that the Interstate Commerce Act, as well as the common law, placed an individual legal obligation on Respondent, an initial carrier in direct competition with the "Virginian" at joint mines to furnish their proportional share of transportation to each mine served by Respondent, joint and local, and the Illinois rule, though somewhat limiting this obligation, being acceptable to the joint mines, Respondent con- [fol. 93] tinued in effect the Illinois rule as published in its Supplement No. 1 to Circular C. S.-31 (Revised) after the Fairmont

case was reopened and consolidated for argument with the Bell & Zoller case, supra, and pending the decision in the latter case.

XI. On December 11, 1912, the Commission rendered an opinion in the Bell & Zoller case, supra (77 I. C. C. Rep.), in which it reversed its former decisions in the Fairmont and Illinois cases, supra, and held that joint mine Rule 4 as published in Circular C. S.-31 (Revised) was not unreasonable, or unduly prejudicial or preferential. Orders were issued dismissing the complaints of the New River Company et al. against the "Chesapeake" and "Virginian."

XIII. The orders issued by the Commission in the cases of New River Company et al. vs. the "Chesapeake" and "Virginian," supra, expressly made the report containing findings of fact and conclusions thereon a part thereof, and while negative in form was necessarily treated by Respondent as affirmative in substance and character. The decision in the Bell & Zoller case, supra, which was expressly made part of the order, did two things, first, it condemned the Illinois rule as published by Respondent, and, second, it approved Rule 4 of Circular C. S.-31 (Revised). Because of the reparation provisions of the Interstate Commerce Act, the effect upon Respondent of the order was necessarily precisely the same as though [fol. 94] the order had been in the affirmative form, requiring Respondent to cease and desist publishing and observing the Illinois rule and in lieu thereof to publish and observe Rule 4 of Circular C. S.-31 (Revised).

XIII. Facing as it did the danger of having to successfully defend suits for heavy damages, believed to approximate as much as $5,000.00 per day, supported by a decision and by reparation orders of the Commission, which it is believed would have automatically followed the failure of Respondent to have observed the rule prescribed by the Commission in the Bell & Zoller case, supra. Respondent, after due notice to Complainant, undertook to cancel the joint mine rule published in Supplement No. 1 to Circular C. S.-31 (Revised) through the issuance of Supplement No. 3 to Circular C. S.-31 (Revised), effective February 10, 1923, copy of which is attached, marked "Appendix No. 2," thereby on that date undertaking to restore Rule 4 as published in Circular C. S.-31 (Revised), as shown in Appendix A of 1911 of Complaint.

XIV. Thereupon Complainant brought this proceeding for the purpose of enjoining, preventing and restraining the "Chesapeake" and "Virginian" from applying Rule 4 of Circular C. S.-31 (Revised) and against the United States and Interstate Commerce Commission to enjoin, set aside and annul the decision and order of the Commission of December 11, 1922, as beyond the delegated powers of the Commission and based upon a mistake of law.

[fol. 95] XV. The statutory duties of common carriers engaged in the transportation of passengers and property in the channels of interstate commerce with respect to the furnishing of transportation are prescribed by the Interstate Commerce Act, and by said

Act are in addition to the remedies existing at common law. The question in issue in this proceeding is one of law and not one of administration of the law, and where the Commission, an administrative body, as in this case undertakes to construe the law, the construction of the law by the Commission is reviewable by the United States courts. As shown in this bill and admitted in the answer, under the construction of the law by the Commission Respondent is at times deprived entirely of the right to use its railroad property for transportation purposes, and unless the Commission has properly interpreted the law Respondent is deprived of its property without due process of law and denied the equal protection of the law assured by the Constitution and laws of the United States and the states.

At common law Respondent would be obligated to furnish cars daily to each mine served by it without regard to the number of cars furnished by another carrier serving such mine, and the fundamental question in issue in this proceeding is whether or not under the provisions of the Interstate Commerce Act the duties of a carrier at common law are abridged or altered to the extent of relieving one common carrier of its duty to furnish transportation because another competing carrier happens to have furnished transportation on a particular day during a period of car shortage.

Respondent sumits that it is entitled to the judgment of a court of competent jurisdiction on this question of law and that the fact [fol. 96] that the order in this case happens to be of alleged negative form ought not in equity to be permitted to operate as a denial of the right to submit to the judgment of the Honorable Court the question of law involved in this case.

XVI. Subject to the qualifications, if any, contained in the foregoing articles, Respondent admits the truth of the allegations of fact contained in Articles 2 to 18, inclusive, and 23.

Respondent is without full knowledge of all the facts recited in Articles 19, 20, 28 and 29, and therefore asks for proof, if deemed material to the issue.

As to the allegations contained in Articles 21, 22, 23, 24, 25, 26 and 27, based upon conclusions of law, Respondent respectfully submits to the jurisdiction of the court, and prays for its protection in the premises.

The Chesapeake and Ohio Railway Company, (Signed) By Garrett B. Wall, Vice President. (Seal.) W. S. Bronson, Richmond, Va., Herbert Fitzpatrick, Huntington, W. Va., of Counsel.

[fol. 97] Affidavit of Garrett B. Wall to above paper omitted in printing.

[fol. 98] APPENDIX No. 1 TO ANSWER OF C. & O. RY. CO.

The Chesapeake and Ohio Railway Company

Office of Superintendent Transportation

Supplement 1 to Circular C. S. 31 (Revised), Dated Jan. 6, 1920

Richmond, Va., September 17, 1921.

To all coal operators:

To comply with decisions (Nos. 12081 to 12084 inc.) of the Interstate Commerce Commission (62 I. C. C. 269) rules governing the distribution of cars to coal mine tipples (other than anthracite) are amended as follows:

Rule 1. The daily rating, or the daily order for cars if less than the rating, shall be the basis for car distribution, except as hereinafter provided for joint mines, in Rule 4.

Rule 4. Each mine operator shall report to the car distributor at four p. m. daily:

(a) Number of unconsigned loads on hand at 7 a. m.

(b) Number of empty and partly loaded cars on hand at 7 a. m.

(c) Additional number of empty cars received during the day.

(d) Aggregate number of empty cars received during the day.

(e) Number of cars loaded during the day.

(f) Number of empty cars standing over at close of day.

(g) Number of empty cars standing over at close of day which were received prior to 7 a. m., — cars; and prior to 10 a. m. — cars.

(h) Number of partly loaded cars under tipple at close of day.

(i) Number of unconsigned loads on hand at close of day.

(j) Additional number of empty cars required for loading following day.

Copies of above report and order for cars for a mine that is joint with any other carrier, (steam, electric or water) shall be filed with a designated representative of each such carrier. On days when such joint mine orders cars from only one carrier it shall have cars based upon its full rating from that carrier; on days when such joint mine orders cars from more than one carrier its rating for car distribution purposes that day on each of such carriers shall be that percentage of its gross daily rating which is obtained by dividing one hundred and fifty per cent by the number of such carriers from which it orders cars that day; provided, however, that in no case

shall such mine on any day be supplied with cars from all carriers combined in excess of its gross daily rating.

No changes in rules 2 and 3, or rules 5 to 13 inclusive.

W. L. Booth, Superintendent Transportation.

[fol. 99] APPENDIX No. 2 TO ANSWER OF C. & O. RY. CO.

The Chesapeake and Ohio Railway Company

Office of Superintendent Transportation

Supplement 3 to Circular C. S. 31 (Revised), Dated Jan. 6th, 1920

Richmond, Va., January 23, 1923.

To all coal operators:

Effective February 10, 1923, Supplement 1 (dated September 17th, 1921) to Circular C. S. 31 (Revised) is cancelled, and rules governing the distribution of cars to coal mine tipples (other than anthracite) will be those comprised in Circular C. S. 31 (Revised)—dated January 6th, 1920, and Supplement 2 thereto, dated November 8, 1922.

W. L. Booth, Superintendent Transportation.

[fol. 100] AT A DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ORDER ALLOWING INTERVENTION OF SLAB FORK COAL CO. ET AL.

The above-entitled cause coming on to be heard, and upon consideration of the application of the Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, Turkey Knob Coal Company, Coal Run Coal Company, Branch Coal Company, Beechwood Coal and Coke Company, Greenwood Coal Company, Laurel Creek Coal Company, Quinnimont Coal Company, Maryland-New River Coal Company, Star Coal & Coke Company, Ephriam Creek Coal & Coke Company, Stover Coal Company, for leave to intervene as intervening defendants and to file their intervening petition herein.

It is ordered, that the said application be and it is hereby granted, that the said parties be and they are hereby permitted to intervene as intervening defendants, and that leave be and it is hereby granted to the said parties to file their said intervening petition herein.

[fol. 101] At a District Court of the United States for the Southern District of West Virginia

[Title omitted]

Order for Hearing

This cause coming on this day to be further heard, and it appearing to the Court that a temporary restraining order was entered herein on the 8th day of February, 1923, staying for a period of sixty days from said date, the operation of a certain decision and ruling and order of December 11th, 1922, of the Interstate Commerce Commission; and it appearing further that the hearing for an injunction as asked for in this cause should be had as speedily as possible; and it appearing that under the law in such case made and provided, that it is necessary for the Judge of this Court to call to his assistance two other Judges, and that in order to obtain the presence of two other judges, one of whom must be a Circuit Judge, it is convenient to have such hearing for such injunction at Richmond, in the State of Virginia, upon motion of plaintiffs by counsel;

It is therefore ordered that the application for such injunction is set for hearing at 10 o'clock A. M. on the 24th day of February, 1923, in one of the court rooms in the Federal Building in the City of Richmond, State of Virginia; and that a copy of this order be served upon or accepted by the defendants or their counsel of record, as speedily as possible after this date.

[fol. 102] At a District Court of the United States for the Southern District of West Virginia

[Title omitted]

Order Continuing Hearing

This cause was by order entered herein on the 17th day of February, 1923, set for hearing at Richmond, Virginia, on the 24th day of February, 1923, at the hour of 10 o'clock A. M., and for reasons appearing to the Court on that day, after the appearance of counsel representing all the interests therein, it is ordered that said hearing be continued to one of the court rooms in the Federal Building, in the City of Richmond, State of Virginia, on the 30th day of March, 1923.

[fol. 103] At a District Court of the United States for the Southern District of West Virginia

[Title omitted]

Order Containing Suspension of Decision and Order of I. C. C., Etc.

This cause having come on to be heard on the 30th day of March, 1923, on the complainants' application for a temporary injunction and also on the merits, and it having been moved by the complainants that the temporary stay or suspension of the operation of the decision, ruling and order of December 11, 1922, issued by the Interstate Commerce Commission in the cause before said Commission, No. 12083, The New River Company, et al., vs. The Virginian Railway Company and No. 12084, The New River Company, et al., vs. The Chesapeake and Ohio Railway Company and of Rule 4 of Circular CS-31 Revised, as referred to and described in the Bill of Complaint in this cause and said motion for continuance of said temporary stay or suspension having, after due notice, been held by three judges, to-wit: Hon. C. A. Woods and Hon. Edmund Waddill, Jr., Circuit Judges, and Hon. Geo. W. McClintic, District Judge, duly convened for said hearing, all parties being represented at said hearing by their attorneys and evidence having been submitted that irreparable damage would result to the complainants unless said temporary stay or suspension is so continued, which said evidence has been transcribed and identified with reference hereto:

It is found, ordered, adjudged and decreed, two of said judges concurring herein, as follows:

1. It is found that irreparable damage would result to the com-[fol. 104] plainants unless said temporary stay or suspension is continued, as prayed for; that the nature of said damage is that unless said temporary stay or suspension is so continued the transportation facilities for the shipment of coal produced by the complainants will be so reduced that it will be impossible for the complainants to fulfill their deliveries on existing contract obligations for the delivery of coal; that the complainants' labor organization, gradually built up through a period of time, will be disrupted and disorganized; that complainants will suffer injury to the good will of their business and loss of present and future business; that the complainants' plant and equipment will become, in part, idle; that the returns on the lessened amount of coal which the complainants will be able to ship will be unable adequately to carry the overhead charges of complainants' plant and their business, and that the cost of the coal produced by the complainants will be increased to a large amount per ton.

2. It is ordered, adjudged and decreed, That the temporary stay or suspension heretofore granted be continued until the decision of this court upon the complainants' application for a temporary injunction.

It is ordered that the evidence of S. A. Scott, taken before this court and transcribed, this 30th day of March, 1923, by a stenographer, and also the evidence of said S. A. Scott, taken on the previous hearing on the granting of a temporary stay or suspension and incorporated as a part of his testimony given on this 30th day of March, 1923, be filed as part of the record in this cause.

Enter above order.

Edmund Waddill, Jr., U. S. Circuit Judge. Beo. W. McClintic, District Judge. Richmond, Va., March 30, 1923.

Woods, Circuit Judge, dissents for reasons heretofore expressed by him.

[fol. 105] At a District Court of the United States for the Southern District of West Virginia

[Title omitted]

Order Filing Petition, Motion to Dismiss, etc.

This cause coming on for hearing and the Intervening Defendants Slab Fork Coal Company, et al., appearing and representing by their counsel, George T. Bell, that when this cause was regularly called for hearing on February 6, 1923, the said intervening defendants then and there presented and filed their intervening petition and motion to dismiss; and on February 16, 1923, presented and filed their answer to the bill of complaint herein; and on February 21, 1923, presented and filed two amendments to their said answer making certain corrections in the same; and on March 28, 1923, presented and filed a third amendment to their said answer making certain further corrections and supplements to the same.

It is ordered: That the said intervening petition and motion to dismiss on behalf of Intervening Defendants, Slab Fork Coal Company, et al., be and they are hereby filed as of February 6, 1923, and the said answer of Intervening Defendants be and it is hereby filed as of February 16, 1923, and the first two said amendments to the answer of Intervening Defendants be and they are hereby filed as of February 21, 1923, and the third said amendment to the said answer be and it is hereby filed as of March 28, 1923.

This order having been directed entered on the 30th day of March, 1923, and being inadvertently omitted from the record is entered nunc pro tunc.

[fol. 106] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

INTERVENING PETITION ON BEHALF OF SLAB FORK COAL COMPANY, SCOTIA COAL & COKE COMPANY, SOUTH SIDE COMPANY, TURKEY KNOB COAL COMPANY, COAL RUN COAL COMPANY, BRANCH COAL COMPANY, BEECHWOOD COAL & COKE COMPANY, GREENWOOD COAL COMPANY, LAUREL CREEK COAL COMPANY, QUINNIMONT COAL COMPANY, MARYLAND-NEW RIVER COAL COMPANY, STAR COAL & COKE COMPANY, EPHRIAM CREEK COAL & COKE COMPANY, STOVER COAL COMPANY

To the Honorable the Judges of the District Court of the United States for the Southern District of West Virginia, sitting in equity:

Now come the Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, Turkey Knob Coal Company, Coal Run Coal Company, Branch Coal Company, Beechwood Coal & Coke Company, Greenwood Coal Company, Laurel Creek Coal Company, Quinnimont Coal Company, Maryland-New River Coal Company, Star Coal & Coke Company, Ephriam Creek Coal & Coke Company [fol. 107] and Stover Coal Company, hereinafter referred to as Petitioners and by this their Intervening Petition respectfully show:

I. That the said petitioner Slab Fork Coal Company is a corporation under and by virtue of the laws of the State of West Virginia, and operating bituminous coal mines within the said State served by defendant the said Virginian Railway Company in the transportation of goods, including coal and coke, in interstate commerce.

That the said petitioners Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, Turkey Knob Coal Company, Coal Run Coal Company, Branch Coal Company, Beechwood Coal & Coke Company, Greenwood Coal Company, Laurel Creek Coal Company, Quinnimont Coal Company, Maryland-New River Coal Company, Star Coal & Coke Company, Ephriam Creek Coal Company and Stover Coal Company are corporations under and by virtue of the laws of the State of West Virginia and operating bituminous coal mines within the said state served by defendant the said Chesapeake & Ohio Railway Company in the transportation of goods, including coal and coke, in interstate commerce.

II. That, insofar as the bill of complaint filed by the complainants in this court in Equity No. 1276 may be regarded as an application to restrain, enjoin and set aside the decision and order of the Interstate Commerce Commission of December 11, 1922 referred to in the said bill of complaint, your petitioners show as grounds for being permitted to intervene in the Equity proceeding No. 1276 aforesaid that they were parties to and interveners in Interstate Commerce Commission Dockets Nos. 12083 and 12084, collectively known as Fairmont & Cleveland Coal Co. v. B. & O. R. R. Co., 62 I. C. C. 269

referred to in the said bill of complaint herein and that they were made parties to and interveners in the said dockets as the result of filing intervening petitions which alleged among other things—

[fol. 108] "2. That the said petitioners are in competition with complainants (the complainants to the bill of complaint herein) both in the production and in the sale of coal, and

"3. That the necessary effect of granting the relief prayed for by complainants during periods of car shortage would be to give their mines more cars than they are entitled to receive, and the mines operated by the said petitioners less cars than they are entitled to receive, under the car service rules, regulations and practices as present in effect."

"4. That, in view of the foregoing facts, the said petitioners are vitally interested in the subject-matter of the complaints filed herein by the complainants, and in the car service rules, regulations and practices applicable at the mine of said complainants as related to the car service rules, regulations and practices applicable at the mines of the said petitioners."

And your petitioners further show that they were also parties to and interveners in Interstate Commerce Commission Docket Nos. 12362 and 12399, collectively known as Bell & Zoller Coal Co. v. B. & O. S. W. R. R. Co., 74 I. C. C. 433, pursuant to all four of which said dockets the Interstate Commerce Commission handed down the decision and order of December 11, 1922 referred to in the said bill of complaint of the complainants herein and appended thereto as appendix C, and which the said complainants are seeking to restrain, enjoin and set aside, and as such parties in interest and interveners in the said dockets and proceedings before the Interstate Commerce Commission have the right to appear before this Honorable Court and be made parties to and intervening defendants in this proceeding in equity under and by virtue of Section 5 of the so-called Commerce Act (36 Stat. L. 539), now part of the so-called [fol. 109] District Court Jurisdiction Act (38 Stat. L. 219) reading as follows:

"Sec. 5. That the Attorney General shall have charge and control of the interests of the Government in all case- and proceedings in the Commerce Court, and in the Supreme Court of the United States upon appeal from the Commerce Court; and if in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action; Provided, That the Interstate Commission and any part- of parties in interest to

the proceeding before the Commission, in which an order of requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the Court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and speed the determination of such suits; Provided further, [fol. 110] That communities, associations, corporations, firms, and individuals, who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the terms of this Act, or the Acts of which it is amendatory or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof, and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervener aforesaid, but said intervener or interveners may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General of the United States therein.

"Complainants before the Interestate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States."

III. That, insofar as the said bill of complaint filed by the complainants herein in equity docket No. 1276 may be regarded as an application to restrain and enjoin the said defendants Chesapeake & Ohio Railway Company and Virginian Railway Company from establishing, observing and enforcing that part of the said Rule 4 of [fol. 111] the said car service Circular CS-31 Revised referred to in the said bill of complaint and reading:

"Copies of orders for cars for a mine that is joint with any other carrier (steam, electric or water) shall be filed with the designated representative of each such carrier, such combinations of orders must not exceed the gross daily rating of the mine."

and which the said defendants, by appropriate notices to the Interstate Commerce Commission and the public, have signified their intention to establish, observe and enforce effective February 10, 1923, as to the said defendant Chesapeake & Ohio Railway Company and effective February 1, 1923 as to the said defendant Virginian Railway Company, your petitioners show as further grounds for being permitted to intervene in the said equity proceeding No. 1276, that they are vitally and directly interested in the establishment, observance and enforcement of the said Rule 4 of the said car service Circular CS-31 Revised referred to in the bill of complaint herein for the reasons stated in paragraph 11 hereof as grounds for their

intervention in the said dockets before the Interstate Commerce Commission as a result of which the Interstate Commerce Commission handed down the decision and entered the order of December 11, 1922, aforesaid; and for the further reason that if the said Rule 4 of the said car service circular CS-31 Revised is not established, observed and enforced, your petitioners will be subjected to an inadequate and unlawful car supply and to unjust and undue prejudice and disadvantage in violation of the Interstate Commerce Act, and to great and irreparable damage, loss and injury.

[fol. 112] IV. That, as further grounds for being permitted to intervene herein, your petitioners are informed and believe and therefore state the fact to be that either or both of the said defendants Chesapeake & Ohio Railway Company and Virginian Railway Company, while professing neutrality, are in a measure and to a certain extent friendly to the position of the said complainants herein as indicated by their said bill of complaint, and that the presence and intervention of your petitioners in this equity proceeding is necessary and desirable for the protection of their direct and vital interest in the establishment, observance and enforcement of the said Rule 4 of the said car service circular CS-31 Revised and to the interest of the public therein.

Wherefore, your petitioners, and each of them, pray that they may be permitted to become parties to this proceeding in equity as intervening defendants, and to be represented by counsel and to take part in all the proceedings had before this Honorable court in the said proceeding in equity and to file any motions or other pleadings which may be permitted to file under the rules of this Honorable court and for such other and further relief as they may be entitled to in equity and as may by this Honorable court be deemed fit and proper.

Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, Turkey Knob Coal Company, Coal Run Coal Company, Branch Coal Company, Beechwood Coal & Coke Company, Greenwood Coal Company, Laurel Creek Coal Company, Quinnimont Coal Company, Maryland-New River Coal Company, Star Coal & Coke Company, Ephriam Creek Coal & Coke Company, Stover Coal Company, By George T. Bell, Their Attorney.

[fol. 113] Affidavit of George T. Bell to above paper omitted in printing.

[fol. 114] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

MOTION TO DISMISS ON BEHALF OF SLAB FORK COAL COMPANY, SCOTIA COAL & COKE COMPANY, SOUTH SIDE COMPANY, TURKEY KNOB COAL COMPANY, COAL RUN COAL COMPANY, BRANCH COAL COMPANY, BEECHWOOD COAL AND COKE COMPANY, GREENWOOD COAL COMPANY, LAUREL CREEK COAL COMPANY, QUINNIMONT COAL COMPANY, MARYLAND-NEW RIVER COAL COMPANY, STAR COAL & COKE COMPANY, EPHRIAM CREEK COAL & COKE COMPANY, STOVER COAL COMPANY, INTERVENING DEFENDANTS

To the Honorable the Judges of the District Court of the United States for the Southern District of West Virginia, sitting in equity:

The above named parties, having been permitted to intervene herein as intervening defendants, now respectfully move the court to dismiss the said bill of complaint and for cause of motion show:

[fol. 115] 1. That the said intervening defendants hereby refer to any motion or motions now or hereafter filed in this equity proceeding by defendant the United States of America or defendant the Interstate Commerce Commission to dismiss the said bill of complaint, and hereby adopt the said motion or motions and incorporate its or their allegations and grounds herein as fully as though set out herein, and pray that the court may consider the said motion or motions as the motion of these intervening defendants.

2. That, as further grounds in support of this motion to dismiss, the said intervening defendants show that the matters and things set out in the said bill of complaint are matters and things peculiarly within the jurisdiction of the Interstate Commerce Commission and not within the jurisdiction of the District Court of the United States for the Southern District of West Virginia.

3. That the said bill shows on its face that the said complainants have not exhausted their remedies before the Interstate Commerce Commission and that the matters and things alleged in the bill to result from the establishment and enforcement of the said Rule 4 of the said Circular CS-31 Revised referred to therein are still pending before the Interstate Commerce Commission on a petition to reopen filed by the said complainants herein in Interstate Commerce Commission Dockets from which resulted the said decision and order of December 11, 1922, and that, until the said complainants exhaust their remedies before the Interstate Commerce Commission, the District Court of the United States for the Southern District of West Virginia has no jurisdiction of the matters and things complained of in the said bill.

4. That it does not appear in said bill that the matters complained of are also the subject of a certain preceeding instituted by the Interstate Commerce Commission on its own motion, the said proceeding [fol. 116] being known as Docket No. 13896, In re Rules Governing Ratings of Coal Mines Other Than Anthracite and the Distribution of Cars to Such Mines, and that pending the conclusion of the said proceeding before the Interstate Commerce Commission the District Court of the United States for the Southern District of West Virginia has no jurisdiction of the matters and things complained of in the bill.

5. That the said bill is without equity.

Wherefore, these intervening defendants pray that the said bill of complaint be dismissed.

Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, Turkey Knob Coal Company, Coal Run Coal Company, Branch Coal Company, Beechwood Coal & Coke Company, Greenwood Coal Company, Laurel Creek Coal Company, Quinnimont Coal Company, Maryland-New River Coal Company, Star Coal & Coke Company, Ephriam Creek Coal & Coke Company, Stover Coal Company, By George T. Bell, Their Solicitor.

[fol. 117] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ANSWER, AS AMENDED, OF INTERVENING DEFENDANTS, SLAB FORK COAL COMPANY, SCOTIA COAL & COKE COMPANY, SOUTH SIDE COMPANY, TURKEY KNOB COAL COMPANY, COAL RUN COAL COMPANY, BRANCH COAL COMPANY, BEECHWOOD COAL AND COKE COMPANY, GREENWOOD COAL COMPANY, LAUREL CREEK COAL COMPANY, QUINNIMONT COAL COMPANY, MARYLAND-NEW RIVER COAL COMPANY, STAR COAL & COKE COMPANY, EPHRIAM CREEK COAL & COKE COMPANY, STOVER COAL COMPANY

To the Honorable the Judges of the District Court of the United States for the Southern District of West Virginia, sitting in equity:

Now come the above-named intervening defendants and, not waiving their motion to dismiss heretofore filed in this cause but expressly relying upon and renewing the same, answering say:

[fol. 118] 1. That the said intervening defendants were parties to and interveners in each and all of the four said dockets before the Interstate Commerce Commission referred to in the said bill of complaint of the complainants herein and as a result of which the

Interstate Commerce Commission handed down the decision and entered the order of December 11, 1922 referred to and complained of in the said bill of complaint. That the said decision and order is attached to the bill of complaint herein as appendix C and as such made a part of the said bill and these intervening defendants refer to the said appendix C and by reference make the same a part of this answer as completely as though fully incorporated herein.

2. Intervening defendants admit the allegations in paragraphs I, II, III, IV, V and VI, and show that the mines of said intervening defendants are among the mines, referred to in paragraph VI of the said bill of complaint as—

"other mines in the state of West Virginia producing the same quality of coal and * * * served singly by one or the other of the carriers defendant herein. All of said mines * * * are in active competition in the marketing in other states of smokeless coal produced and mined in West Virginia and transported in interstate commerce," etc.

3. Intervening defendants admit the allegations of paragraphs VII, VIII and the first sentence of paragraph IX but, with reference to the allegations contained in the second sentence of the said paragraph IX, refer to the decision of the Interstate Commerce Commission in Fairmont & Cleveland Coal Co. v. Baltimore & Ohio Railroad Company, 62 I. C. C. 269, a copy of which decision is at-
[fol. 119] tached to the bill as appendix B, for a more correct statement of the rules for the rating of mines and the distribution of cars among the mines applied by the defendant railways prior to the period of Federal control. Intervening defendants admit that the ratings of all mines under the rules now maintained by the said railway defendants represent, for purposes of car distribution, the daily capacities of the mines to produce and ship coal.

4. Intervening defendants admit the allegations of paragraph X of the said bill of complaint.

5. Intervening defendants say, with reference to the matters alleged in the first sentence of paragraph XI of the bill, that the circular dated March 3, 1920 isued and promulgated by the Interstate Commerce Commission shows on its face that it was issued—

"To the end that conflicting and contradictory rules on different roads and in different fields may be avoided in the unusual conditions which now exist in the industries and on the roads, the Commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial and especially during the remainder of the early spring and uniform rules as contained in the Railroad Administration's Car Service Section Circular CS-31 (Revised) be continued in effect."

Intervening defendants admit the allegations contained in the second sentence of the said paragraph XI of the bill.

6. Intervening defendants admit that on January 11, 1921 complainants filed complaints with the Interstate Commerce Commis- [fol. 120] sion separately against the two railway defendants herein, as alleged in paragraph XII of the bill. A copy of the complaint against the Chesapeake & Ohio Railway Company is hereto attached as Exhibit A, and intervening defendants show that the complaint against the Virginian Railway Company was identical in allegations with that of the complaint against the said Chesapeake & Ohio Railway Company except that it was directed against the said Virginian Railway Company instead of the said Chesapeake & Ohio Railway Company.

In respect to the other allegations of paragraphs XII and XIII of the bill regarding the decision of the Commission in the proceeding known as Fairmont & Cleveland Coal Co. v. Baltimore & Ohio Railroad Co., 62 I. C. C. 269, intervening defendants refer to the said decision appended to the bill as Appendix B for a more correct statement of what the Commission found in the said proceeding.

7. In respect to the allegations contained in paragraph XIV of the bill down to and through the quotation therein from the decision of the Commission in the proceeding known as Bell & Zoller Coal Co. et al. v. B. & O. S. W. R. R. Co., et al., intervening defendants refer to the said decision which is appended to the bill as Appendix C for a more correct statement of what the Commission found and held in and by the said decision. Intervening defendants show that the following railroads were defendants in the said Dockets Nos. 12362 and 12399 collectively known as Bell & Zoller [fol. 121] Coal Co., et al. v. B. & O. S. W. R. R. Co.:

Baltimore & Ohio Southwestern Railroad,
Chicago, Peoria & St. Louis Railroad,
Cincinnati, Indianapolis & Western Railroad,
Chicago & Eastern Illinois Railroad,
Chicago & Northwestern Railway,
Chicago, Burlington & Quincy Railroad,
Chicago & Alton Railroad,
Chicago, Indianapolis & Louisville Railway,
Chicago, Terre Haute & Southeastern Railway,
Cleveland, Cincinnati, Chicago & St. Louis Railway,
Illinois Central Railroad,
Louisville & Nashville Railroad,
Missouri Pacific Railroad,
Pittsburg, Cincinnati, Chicago & St. Louis Railway,
Southern Railway,

With particular reference to the allegation in the said paragraph XIV that a petition was filed with the Commission to reopen for further consideration the said dockets Nos. 12081-12084, intervening defendants show that they filed the said petition to reopen and that a copy of the said petition is hereto attached and marked Exhibit B.

In respect to that part of paragraph XIV of the bill reading—

"By said decision, order and ruling of the Commission each of the carriers, defendant herein, is authorized and required to limit

its car service to your complainants, and others similarly circumstanced, below the car service which it furnishes to the local mines served by it, as in said Commission's report set out, and said limitation of obligation is arrived at, as to each carrier, by reason of car service and transportation furnished to your complainants, and others similarly circumstanced, by another independent and competing carrier,"

intervening defendants say that the said decision, order and ruling of the Commission dismissed the complaints of the said complain-
[fol. 122] ants herein and did not require the carriers, defendants herein or either of them, to limit car service to the said complainants "below the car service which it furnishes to the local mines served by it" as alleged in the quoted portion of the said paragraph XIV aforesaid. Intervening defendants aver that under the said Rule 4 of Circular CS-31 Revised, the complainants and each of them have the right to tender the entire shipping capacity of any of their joint mines, as represented by the gross daily rating of the mine, to either of the two railway defendants herein and to request transportation on that basis, in which event the joint mine will be entitled to and will receive the same pro rata distribution of cars as a local mine tendering the same shipping capacity to the same carrier on the same day. Intervening defendants further aver that under the said rule any of the joint mines of complainants have the right to split its tender, that is to tender part of its shipping capacity or gross daily rating to one carrier and part to another and to request transportation on that basis, in which event it will be entitled to and will receive the same prorata distribution of cars from each carrier as local mines making similar tenders or similar requests for transportation to those particular carriers on the same day. Intervening defendants further aver that because of the right of the joint mines of complainants or any of them to tender their entire shipping capacity or gross daily rating to either of the said railway defendants herein or to split their tenders of shipping capacity or gross daily rating between the two said railway defendants in any manner complainants may choose, the said joint mines receive or may receive a greater supply of cars than do local mines of the same capacity as found and set out in the said decisions of the Commission appended to the bill as appendices B and C.
[fol. 123] In respect to the allegation of the said paragraph XIV of the bill reading—

"Under said decision, order and ruling if any of your complainants in time of car shortage has availed itself of its right of shipment by the carrier which has the largest available percentage of car supply, to ship so much of its coal as said carrier can take and then desires to ship the remainder of its goods by the other independent and competing carrier, said other carrier is prohibited from giving any transportation service whatsoever to said complainants solely because of the first carrier having taken a portion of the goods which your complainant has desired to ship by it. Thus if one of your

complainants desires to ship all its coal to the Atlantic seaboard by one of the said carriers and orders cars therefor and said carrier, by reason of having only an 80 per cent supply is able to transport only 80 per cent of said coal, the other of said carriers on whose line your complainant is located, and which has a 40 per cent car supply, and by whom your complainant desires to ship the balance of its coal to the Atlantic seaboard, is prohibited from giving any transportation service to your complainant although to other shippers located on its road desiring to ship coal by it, it is giving a 40 per cent service,"

intervening defendants say that when, in the foregoing illustration, one of the complainant joint mines ordered its entire gross daily rating of cars from the said carrier having an 80 per cent supply for shipment "to the Atlantic seaboard" on a given day, the said joint mine tendered and set aside its entire productive and shipping capacity for that day to the said one carrier, and as a result said joint mine had no productive and shipping capacity remaining to make the subject of a tender or request for transportation on that day to the said carrier having a 40 per cent car supply.

Intervening defendants further show that the said circular CS-31 Revised contains a rule requiring each mine to place its orders for cars at or before 4 o'clock of the day before the cars are desired for loading, that is, cars desired for loading on Tuesday must be ordered on Monday. This requirement applies alike to joint mines and local mines, and was not attacked by complainants in their said complaints [fol. 124] before the Commission, and is not attacked by complainants in their said bill of complaint filed herein. When, therefore in the above quoted illustration in the bill of complaint, one of the complainant joint mines on Monday ordered its entire gross daily rating from the carrier having an 80 per cent car supply and thereby tendered its full shipping capacity for shipment "to the Atlantic seaboard" via said carrier on Tuesday, and the said carrier furnished sufficient cars to satisfy 80 per cent of the mines' productive and shipping capacity on Tuesday, it was then too late under the requirement aforesaid for the said mine to place any order for cars with the other carrier for loading on Tuesday and too late for the said other carrier to furnish any cars to the said mine for loading on Tuesday. If, as assumed in the foregoing illustration, the said other carrier is giving a 40 per cent service on Tuesday "to other operators located on its road" it is because said other operators placed their orders for cars, that is made their request for service, on Monday in compliance with the rule aforesaid requiring orders for cars to be presented on the day before the cars are desired for loading.

8. With respect to the allegations of paragraph XV of the bill of complaint, intervening defendants refer to the said decision and order of December 11, 1922 appended to the bill as appendix C for correct information as to what the Commission held and required in and by said decision and order. And intervening defendants further show that the said Circular CS-31 Revised and Rule 4 thereof

were in full force and effect on February 29, 1920 as stated in the closing sentences of paragraph X of the said bill of complaint herein, and that in and by paragraph (a) of Section 208 of the Transportation Act., 1920 (41 Stat. L., 464) all regulations in any wise affecting any part or the aggregate of rates or the value of the service [fol. 125] rendered which were in effect on February 29, 1920 are required to be continued in force and effect until changed by state or Federal authority or pursuant to authority of law, and intervening defendants show that the said Rule 4 of Circular CS-31 Revised affects rates and the value of the service rendered by carriers subject to the Interstate Commerce Act and is therefore required to be continued in force and effect until changed by state or Federal authority or pursuant to authority of law, and intervening defendants are informed and believe and therefore state the fact to be that the Interstate Commerce Commission has given no such authority. In this connection, intervening defendants show that the Baltimore & Ohio Railroad Company and the Monongahela Railway Company, the defendants to Interstate Commerce Commission Dockets Nos. 12081 and 12082, respectively, referred to in Article XII of the bill, restored the said Rule 4 on December 11, 1922 and January 4, 1923, respectively.

9. With respect to the allegations of paragraph XVI of the said bill of complaint intervening defendants show that the decision and order of the Interstate Commerce Commission in the said Dockets Nos. 12081–12084 inclusive, was handed down on December 11, 1922 and was served upon the complainants herein on or before December 15, 1922, and yet none of the complainants herein made any application to the Interstate Commerce Commission to reopen the said dockets until January 11, 1923, as stated in the said paragraph XVI of the bill. Intervening defendants show that under the Rules of Practice of the Interstate Commerce Commission the other parties to the said dockets were entitled to a period of ten days within which to file replies to the said petition to reopen unless otherwise ordered by the Commission. And intervening defendants further show that they were parties to the said dockets and applied for [fol. 126] and were given an extension of time to January 29, 1923 within which to file their reply to the said petition to reopen. And intervening defendants further show that they filed their reply to the said petition to reopen on January 26, 1923 and that certain local-mine operators, interveners in said dockets Nos. 12362 and 12399, collectively known as Bell & Zoller Coal Co. et al. v. Baltimore & Ohio Southwestern Railroad Company et al., petitioned and were permitted to file a reply to the said petition of complainants herein to reopen the proceeding in the said docket Nos. 12083 and 12084, and that the said local-mine operators filed their reply to the said petition on January 27, 1923. Copies of complainants' petition to reopen and of the aforesaid replies thereto are hereto attached and marked Exhibits C, D and E respectively.

Intervening defendants show that the bill of complaint herein was filed on January 29, 1923, or before the Commission had had

an opportunity to consider and pass upon the said petition to reopen and the said replies, and intervening defendants are informed and believe and therefore state the fact to be that the said petition to reopen and replies are now under advisement by the Commission.

10. Intervening defendants are not informed as to the correctness of all the allegations of paragraph XVII of the bill, but they aver that there are over fifty joint mines served by the two railways defendants herein in the New River District of West Virginia wherein is located the joint mines of complainants and that only thirteen of the said more than fifty joint mines are shaft mines and that the remaining joint mines are drift or slope mines similar to the local mines of intervening defendants.

Intervening defendants deny the statement contained in the said paragraph XVII of the bill that the said White Oak Railway and [fol. 127] Piney River and Paint Creek Railroad were built to connect the mines thereon with both the Chesapeake & Ohio Railway and the Virginian Railway, and refer to page 5 of the report of the said White Oak Railway to the Interstate Commerce Commission for the five months ended November 30, 1912, wherein it is stated under oath that the said railway was built by the Stuart Colliery Company, one of the complainants herein, "for the purpose of developing their property and to reach their mines and deliver the coal to the Chesapeake & Ohio Railway," and to page 5 of the report of the Piney River & Paint Creek Railroad for the same period wherein it is stated under oath that the said railroad was built by the Cranberry Fuel Company, another of the complainants herein, "for the purpose of developing their property and to reach their mines and deliver the coal to the Chesapeake & Ohio Railway." And intervening defendants are informed and believe and therefore state the fact to be that when the said White Oak Railway and Piney River & Paint Creek Railroad were built, the said Virginian Railway had not been constructed and extended to the district served by the two short roads aforesaid and that it was not then known what route would be taken by the said Virginian Railway in the construction and extension of its railway line.

With respect to the so-called reciprocal trackage rights, arrangements and agreements referred to in said paragraph XVII of the bill, intervening defendants show that the said reciprocal trackage rights, arrangements and agreements are now the subject of numerous formal complaints pending before the Interstate Commerce Commission, and that among said formal complaints are Docket No. 13832, Gulf Coal Company v. Virginian Railway Company et al. and Docket No. 14454, Wyoming Coal Company et al. v. The Virginian Railway Company et al. and Docket No. 14498, Ragland Coal Company et al. v. The Virginian Railway Company et al. and that in and by the said formal complaints it is alleged, among other things, that the said reciprocal trackage rights, arrangements and agreements subject the complainant companies to undue prejudice and disadvantage and give other companies, including the complainants to the said bill of complaint herein, undue preference and advantage in violation

[fol. 128] of the Interstate Commerce Act. And intervening defendants further show that each and all of the mines of the said complainants herein are located upon the rails of only one carrier and that it is only by the operation of the said so-called reciprocal trackage rights, arrangements and agreements that the said mines are accorded the joint status claimed by the said complainants herein as the basis of their alleged right to order and receive cars from both the said defendant carriers herein.

11. The intervening defendants admit the allegations of paragraph XVIII of the bill of complaint.

12. That, in respect to the allegations of paragraph XIX of the bill, intervening defendants show that the supply of cars furnished to their mines and to other mines similarly circumstanced is also inadequate to transport the coal which the said mines have been developed to produce and are producing and which they have available for shipment and desire to ship.

13. That in respect to the allegations of paragraph XX of the bill, intervening defendants say that they are also desirous of using the particular defendant carrier on which their mines are located to ship in interstate commerce the full amount of coal which the said carrier can receive and transport for intervening defendants, and intervening defendants further show that they and each of them are also prepared to ship and desire to ship by the particular carrier on which their mines are located coal in excess of the amount which the said carrier can furnish cars for on a parity with other mines.

[fol. 129] 14. Intervening defendants deny the allegations of paragraph XXI of the bill that the decision and order of the Interstate Commerce Commission of December 11, 1922 and the said Rule 4 constitute an encroachment upon and a curtailment of the legal right of complainants or any of them to the service of a common carrier in interstate commerce on a parity with other shippers offering similar shipments to said carrier and of the carrier's legal duty and legal and property right as a common carrier to serve the complainants or any of them as said common carrier, or deprive complainants or any of them of their property or legal rights in any respect whatsoever. On the contrary, intervening defendants aver that the said Rule 4 fully recognizes the property and legal rights of complainants and each and all of them and the legal rights and obligations of the railway defendants herein and each of them. The said Rule 4 recognizes the right of complainants to tender the shipping capacities of their mines and to request transportation of either or both of the said railway defendants herein and to request transportation of the coal which can be produced by their joint mines of either or both of the said railway defendants herein, but the said rule in effect requires complainants, as other rules in the said Circular CS-31 Revised in effect require intervening defendants, to accompany their daily orders for cars with bona fide contemporaneous tenders or setting aside of sufficient productive capacities to load and ship the aggregate number of cars ordered. The said Rule 4 recognizes the

common carrier obligations of the said railway defendants herein to furnish cars for loading coal, but intervening defendants aver that the said obligations of the said railway defendants are not called into play unless and until orders for cars and requests for transportation by whomsoever made are accompanied by actual or constructive tenders of sufficient coal to load the aggregate number of cars ordered on the particular day for which the cars are ordered.

[fol. 130] 15. That with respect to the allegations of paragraph XXII of the said bill, intervening defendants for want of complete information deny the statements therein contained to the effect that shippers of other classes of merchandise may properly order cars in excess of their needs as determined by the quantity of goods which they have or can make ready for shipment on the day for which the cars are desired for loading, or that in times of car shortage shippers of other classes of merchandise may properly receive cars based upon orders in excess of their needs as determined by the amount of goods which they have or can make ready for shipment on the day for which the cars are desired for loading. Intervening defendants further show that the complaints filed by the complainants herein with the Interstate Commerce Commission did not present any issue of discrimination as between the complainant shippers of coal on the one hand and shippers of other classes of merchandise on the other. Intervening defendants further show, in respect to the allegations of Article XXII of the bill, that next in importance to the seasonal shortages of coal cars are the seasonal shortages of grain cars and that the railroads of the United States through the American Railroad Association have in effect rules providing that cars for the loading of grain shall be distributed among the shippers in accordance with their orders based upon the quantity of grain on hand and tendered for shipment and that among such rules is the following rule governing the orders of shippers located on more than one railroad:

"Copies of orders by a shipper located on more than one carrier (steam, electric, or water) shall be filed with the agent of each carrier. Such combined orders must not exceed the total grain conveniently located for prompt loading tendered for shipment."

16. In respect to the allegations of paragraph XXIII of the bill [fol. 131] intervening defendants refer to the said decision and order of December 11, 1922 as set out in appendix C of the bill for a more correct statement of what the Commission found and held in and by the said decision and order. In respect to the allegations of the said paragraph of the bill regarding the effect of the said Rule 4, intervening defendants aver that the effect of the application of the said rule is to limit requests of joint mines for transportation to reasonable requests, that is requests which are accompanied by a contemporaneous tender or setting aside of sufficient capacity of the joint mine to load and ship the number of cars named in the request on the particular day for which the said cars are desired for loading. Intervening defendants further aver that other rules in the said Circular CS-31 Revised limit the requests of local mines for transportation to reasonable requests, that is requests which are accompanied by a contemp-

raneous tender or setting aside of sufficient capacity of the mine to load and ship the number of cars named in the request on the particular day for which the cars are ordered. And intervening defendants further aver that the treatment of joint mines and local mines is the same in this respect, and that the said treatment is not discriminatory against the joint mines or any of them.

17. With respect to the statements contained in paragraph XXIV to the effect that, by exchanging information with each other in regard to the number of cars ordered by joint mines and other information, the said carriers are committing acts contrary to the laws of the United States and of the States of Virginia and West Virginia, intervening defendants deny the said allegations and point out that the decision of the Commission as set out in appendix B to the bill of complaint states some of the reasons why it is necessary and desirable for carriers serving joint mines to exchange information. And intervening defendants further show that it is necessary and desirable for [fol. 132] the railroads serving a joint mine to exchange information regarding the orders for cars placed by such mine in order to prevent such mine from placing aggregate orders for cars in excess of its aggregate rating and thereby falsely and fraudulently to represent that it has sufficient coal ready for immediate shipment to load a greater number of cars on a given day than the number represented by its aggregate rating. And intervening defendants refer in this connection to paragraph (4) of Section 10 of the Interstate Commerce Act (25 Stat. L., 855), wherein it is made unlawful for any shipper delivering property for transportation to a common carrier by payment of money or otherwise to induce or attempt to induce any common carrier to unjustly discriminate in his favor as against any other shipper in the transportation of property. Intervening defendants further show that the exchanging of information referred to in the said paragraph XXIV of the bill is a mere police regulation of the carriers serving joint mines, similar in purpose and effect as other police regulations maintained and enforced by carriers such as weighing and inspection bureaus.

18. That with respect to paragraph XXV of the bill intervening defendants deny that the said decision and order of December 11, 1922 dismissing the complaints of the complainants therein, also complainants herein, requires defendant carriers to equalize the labor conditions at joint mines and local mines or in any way makes any requirement which will have the effect of demoralizing labor and production organizations of joint mines or any of them.

19. Intervening defendants further say, with relation to all the matters and things contained in the said bill of complaint, not herein specifically denied or admitted, that they deny the same and deny all allegations and averments in said bill save and except such as are [fol. 133] by this their answer specifically admitted to be true.

20. Intervening defendants further aver that the matters and things complained of in the bill are the subject of a proceeding now pending before the Interstate Commerce Commission known as

Docket No. 13896, in Re Rules Governing Rating of Coal Mines Other Than Anthracite and the Distribution of Cars to Such Mines, instituted by the Commission upon its own motion, wherein the reasonableness and propriety of the rules and regulations contained in Circular CS-31 Revised and each and every rule thereof including said Rule 4 are under consideration. A copy of the order of the Commission instituting the said proceeding known as Docket No. 13896 is attached to the Motion to Dismiss heretofore filed by intervening defendants and is hereby referred to and made a part hereof. The order instituting the said investigation was given wide publicity by the Commission and was referred to at length in the newspapers and coal journals of the country and intervening defendants are informed and believe and therefore state the fact to be that the said complainants herein are parties to and are represented by counsel in the said investigation. And intervening defendants further show that the said investigation is still pending before the Commission.

21. And intervening defendants further show that under the said Circular CS-31 Revised the daily capacity of each mine is determined by taking the total coal tonnage shipped by the mine during the preceding month via the single carrier serving it in the case of a local mine and via the two or more carriers serving it in the case of a joint mine, dividing the said total coal tonnage shipped by the number of hours worked in producing it, and multiplying the quotient by eight which is the number of hours in the recognized work-day in [fol. 134] the said New River District referred to in the bill. The result is termed the daily rating of a local mine and the gross daily rating of a joint mine, and represents in each case the maximum shipping capacity of the mine. On any day when the number of cars available for coal loading is such that all orders for cars filed on the previous day cannot be filled, the rules contained in the said Circular CS-31 Revised including the said Rule 4 provide that the available cars shall be divided and distributed among the mines in accordance with their respective ratings or orders if less than their ratings, and in effect require each and every mine whether local or joint to accompany its order for cars with a contemporaneous tender setting aside sufficient capacity to load and ship the number of cars ordered. And, as the daily rating of a mine represents its maximum shipping capacity, its order is not recognized to the extent that it exceeds its rating. Intervening defendants further show that under the rules contained in the said Circular CS-31 Revised including the said Rule 4, a joint mine may tender its entire rated capacity although determined upon the basis of its shipments during the preceding months via the two or more carriers serving it, to only one of the said carriers on one day and to another of the said carriers on the following day, or it may divide its said tender between the said carriers in any manner it may choose. As a result of the right and privilege aforesaid, joint mines receive or may receive a greater supply of cars on the average than do local mines of the same rated capacity, as found and set out in the said decision of the Commission appended to the bill as appendices B and C. Joint mines are entitled to the greater car supply thus obtained by reason of their advantageous

location on two or more railroads and intervening defendants aver that nothing in the said decision of the Commission or in the said Rule 4 deprives the joint mines of complainants or any of them of the said advantages.

And intervening defendants further aver that under and by virtue of the so-called 150 per cent rule joint mines, when placing orders for cars with two or more carriers on the same day, are partially [fol. 135] relieved of the requirement aforesaid of accompanying their said orders with contemporaneous tenders setting aside sufficient capacity to load and ship the aggregate number of cars ordered. Under the said 150 per cent rule, a joint mine is permitted to make a genuine tender of 75 per cent of its capacity to one carrier and a genuine tender of 25 per cent and a bogus and counterfeit tender of 50 per cent to the second carrier, or a geniune tender of 50 per cent and a bogus and counterfeit tender of 25 per cent to each of the said carriers and to receive a proportional share of the available cars on the basis of the said genuine tenders and a further and additional proportional share of the cars on the basis of the said bogus and counterfeit tenders. And notwithstanding the said privilege accorded to a joint mine under and by virtue of the said 150 per cent rule, a local mine is at all times required to make a genuine tender of sufficient capacity to load and ship all cars ordered on the particular day for which they are ordered, and its car supply is at all times limited to its proportional share of the available cars on the basis of the said genuine tenders. Under the said 150 per cent rule, the carriers give the same consideration to the said bogus and counterfeit tenders of joint mines as to the said genuine tenders of local mines; that is to say, they allot the same number of cars to a joint mine on a bogus and counterfeit tender of capacity to load 50 cars as they contemporaneously allot to a local mine on a genuine tender of capacity to load the same number of cars.

Intervening defendants therefore aver that the said Rule 4 is not unjust, unreasonable or otherwise unlawful and that the Interstate Commerce Commission was fully justified in so finding and that this court should not substitute its judgment for that of the said Commission.

22. Intervening defendants further aver that under the application of the so-called 150 per cent rule aforesaid complainants and [fol. 136] other joint-mine operators receive a greater supply of cars than the just, reasonable and non-discriminatory shares to which they and each of them are entitled under the rule which the Commission, acting within its authority has found and held to be not unjust, unreasonable, or unduly prejudicial, and that to the extent that the said joint-mine operators receive cars in excess of and beyond their just, reasonable and non-discrimnatory shares, intervening defendants and other local-mine operators are deprived of their just, reasonable and non-discriminating shares of the available supply of cars. In times of car shortage, that is during periods when the available supply of cars is insufficient to meet the demands of the coal operators, each and every car given to the complainants and other

joint-mine operators in excess of and beyond their aggregate just, reasonable and proper share of the available pool of cars means a car taken away from the aggregate just, reasonable and proper share of intervening defendants and other local-mine operators.

23. Intervening defendants further aver that they and each of them have invested large sums of money in their coal-mining properties and in developing their said mines to their present rated capacity. They and each of them are so equipped as to capital, productive and selling organizations and other facilities and instrumentalities to produce and market the full amount of coal which could be loaded and shipped in the number of cars represented by their respective just, reasonable and lawful prorata shares of the available cars if joint mines like local mines were compelled to accompany their orders for cars with contemporaneous tenders of capacity to load and ship all cars ordered. But because of the operation of the said 150 per cent rule as described in paragraph 21 hereof intervening defendants and each of them are being deprived of their respective just, reasonable and lawful shares of the cars available for coal loading on the lines of the said railway defendants and as their said mines cannot operate without railway cars under the tipple in- [fol. 137] tervening defendants and each of them are suffering great and irreparable damage in the loss of returns on investment, in wastage and disuse of equipment, in demoralization and loss of labor forces, in lack of employment and demoralization of selling organizations, in loss of profits and contracts by reason of inability to deliver coal thereunder, and in loss of sale of coal and contracts of sale which, except for the deprivation of their just, reasonable and lawful shares of the available cars, intervening defendants are in position to make and desire to make. And intervening defendants further aver that they and each of them will continue to be subjected to such great and irreparable loss, damage and injury if the said Rule is set aside and enjoined and not permitted to become effective.

24. Intervening defendants therefore submit:

First. That the said complainants filed complaints with the Interstate Commerce Commission attacking the said Rule 4 as unjust, unreasonable and unduly prejudicial in violation of Section 1 and 3 of the Interstate Commerce Act, hearings were had and briefs and arguments submitted and upon reargument the Commission found and concluded that the said Rule 4 is not unjust, unreasonable or unduly prejudicial and by appropriate order dismissed the complaints, and that the District Court of the United states for the Southern District of West Virginia has no jurisdiction to set aside or annul this negative order of the Commission.

Second. That the reasonableness and propriety of the said Rule 4 and the matters and things in respect thereof complained of in the bill are within the peculiar jurisdiction and authority of the Interstate Commerce Commission and that as the said Commission, acting within its said jurisdiction and authority, has found and concluded that the said Rule 4 is not unjust, unreasonable and unduly

prejudicial within the terms of Section 1 and 3 of the Interstate Commerce Act, the District Court of the United States for the Southern [fol. 138] District of West Virginia has no jurisdicition to review the said finding and conclusion of the Commission and to substitute its judgment for that of the Commission.

Third. That the said Rule 4 complained of in the bill does not deprive complainants or any of them of any common law, statutory or property right whatsoever and does not relieve the said defendant railways or either of them of any common-carrier obligation to the said complainants or any of them and the said complainants or any of them are not entitled to the equitable relief prayed for and the District Court of the United States for the Southern District of West Virginia has no jurisdiction or authority to grant the relief prayed for or to annul and set aside the said Rule 4 or to restrain and enjoin the said defendant railways herein from enforcing and applying the same.

Fourth. That as the matters and things complained of in the bill are still pending before the Commission both on complainant's petition to reopen the proceedings in the said Dockets 12083 and 12084 and also as a result of the order of investigation entered by the said Commission in said Docket No. 13896, the District Court of the United States for the Southern District of West Virginia has no jurisdiction of the said matters and things complained of in the bill.

Wherefore, intervening defendants and each of them pray that the temporary order entered by this Honorable Court on February 8th, 1923 be set aside, dissolved and cancelled, and that the said bill of complaint be dismissed with costs to the complainants.

Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, Turkey Knob Coal Company, Coal Run Coal Company, Branch Coal Company, Beechwood Coal and Coke Company, Greenwood Coal Company, Laurel Creek Coal Company, Quinnimont Coal Company, Maryland-New River Coal Company, Star Coal & Coke Company, Ephriam Creek Coal & Coke Company, Stover Coal Company, By George T. Bell, Their Solicitor.

[fol. 139] Affidavit of G. H. Caperton to above paper omitted in printing.

[fols. 140 & 141] Affidavit to annexed paper omitted in printing.

[fol. 142] EXHIBIT A TO AMENDED ANSWER

Before the Interstate Commerce Commission

Docket No. —

THE NEW RIVER COMPANY, WHITE OAK COAL COMPANY, WHITE OAK FUEL COMPANY, STUART COLLIERY COMPANY, DUNNLOOP COAL & COKE COMPANY, BECKLEY COAL & COKE COMPANY, MABSCOTT COAL & COKE COMPANY, CRANBERRY FUEL COMPANY

v.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

Complaint

The complaint of the above-mentioned Complainants respectfully shows:

1. That Complainant, the New River Company, is a corporation of the State of West Virginia, which controls by stock ownership the other Complainant corporations hereinafter named; that the White Oak Coal Company is a corporation of the State of West Virginia engaged in the sale of the entire output of coal from the mines of the following-named Complainants; that the White Oak Fuel Company, Stuart Colliery Company, Dunnloop Coal & Coke Company, Beckley Coal & Coke Company, Mabscott Coal & Coke Company and Cranberry Fuel Company are corporations of the State of West Vir-[fol. 143] ginia, each of which is operating one or more mines in Fayette and Raleigh Counties, West Virginia, known as the New River District, which said mines are served by said Defendant either directly or by means of trackage, lease, or operating arrangements with other railroads; that the operating offices of said corporations are located at MacDonald, West Virginia. The general offices of all of the Complainants are located at 85 Devonshire Street, Boston, Massachusetts.

II. That the Defendant above named is a common carrier engaged in the transportation of passengers and property wholly by railroad between points in the State of West Virginia, including the mines of said Complainants, and points in various other States, and as such common carrier is subject to the provisions of the Act to regulate Commerce approved February 4, 1887, and acts amendatory thereto and supplementary thereof, including the act known as the Transportation Act, 1920, approved February 28, 1920:

III. That this complaint refers only to the rules, regulations and practices of Defendant as affecting mines of said operating companies which are served jointly by the Defendant and by some other carrier or carriers and are known as indicated in the following table:

[fol. 144] Name of operating company	Name of mine
White Oak Fuel Company	Scarboro.
	Whipple.
	Oakwood.
Stuart Colliery Company	Summerlee.
	Lohgelly.
Dunnloop Coal & Coke Company	Dunnloop.
Beckley Coal & Coke Company	Beckley.
Mabscott Coal & Coke Company	Mabscott.
Cranberry Fuel Company	Cranberry No. 1.
	Cranberry No. 2.
	Cranberry No. 3.

IV. That all of said mines mentioned in paragraph III carry a heavy overhead charge, and the overhead expense of such mine developments can be successfully carried only if the mines can be continuously operated; that the investment of The New River Company in its mine operations is very large and the investment moneys therefor could have been, and were, secured only upon the assumption that these mines were so geographically located that they could have connection with, and service from, more than one trunk line connection, there being at that time no rule of law which prohibited the mine from receiving a full car supply from each of its said connections.

V. That since the beginning of the operation of the mines of the Complainants mentioned in paragraph III hereof they, and each of them, have been served jointly by this Defendant and by the Chesapeake & Ohio Railway Company and are therefore hereinafter called joint mines; and that each of said joint mines has continuously re-
[fol. 145] ceived car service from each of the said connections and is still being served by each of them.

VI. That on or about January 1, 1918, the said Defendant and the Chesapeake & Ohio Railway Company were taken over and operated by the Government, said operation by the Government continuing until March 1, 1920, since which time each of said carriers has been operated by its own officers.

VII. That during the months following the taking over of the properties by the Government each of the common carriers named furnished car service at each of said mines upon the same basis as had been afforded by them prior to Federal control.

VIII. That on, to-wit, September 1, 1918, as a war measure to meet the war emergency, the United States Railroad Administration, acting in conjunction with the United States Fuel Administration, and acting through its Car Service Section, issued its circular known as C. S-31, which provided, among other things, in rule 4 of "Rules Governing the Distribution of Cars to Coal Mines," the following:

"Copies of orders for cars for a mine that is joint with any other carrier (steam, electric or water) shall be filed with the designated

representative of each such carrier. Such combinations must not exceed the gross daily rating of the mine."

[fol. 146] IX. That the rule quoted in the last preceding paragraph was issued as a war measure to meet the war emergency at the time of its publication and was issued at the time when the markets for coal were zoned by the United States Fuel Administration; that said rule was promulgated, therefore, at a time when competitive conditions had been eliminated, as a war measure, both from the transportation situation and from the marketing of coal.

X. That, notwithstanding the promulgation of said rule limiting the supply of cars at joint mines, the rule was not strictly enforced until during October, 1919; and that thereafter the said rule has been rigidly enforced to the prejudice of the operators of joint mines, particularly to the prejudice of complainants' joint mine operations.

XI. That at the expiration of said Federal control, and upon the assumption of the operation of its railroad by its owners, the said Defendant herein, as well as the Chesapeake & Ohio Railway Company, was called upon to cancel the rule quoted in paragraph VIII hereof and it has refused to do so, basing its refusal upon certain ex parte rulings of the Commission issued under date of March 2 and April 15, 1920, respectively, bearing upon the rules of car distribution at bituminous coal mines, hereto appended, marked respectively Exhibit A and Exhibit B.

XII. That under the operation of said rule for the distribution of [fol. 147] Defendant's available coal car equipment, it has resulted and continues to result that a smaller pro rata share of Defendant's available empty cars is distributed to each of the mines mentioned in paragraph III hereof than is distributed to, and is received by, mines served by the Defendant's line in the same territory that are local to its rails and not served by any other carrier.

XIII. That said rule quoted in paragraph VIII hereof has in its operation the effect of denying to these Complainants the natural advantage to which their geographic location entitles them; and that said rule is an attempt to limit, without authority of law, the obligations of the Defendant as a common carrier, in so far as it attempts to excuse its failure to furnish a full pro rata share of available equipment on the ground that certain other carrier or carriers are furnishing equipment to the Complainants and other operators of joint mines.

XIV. That by reason of the facts stated in the foregoing paragraphs, Complainants are subjected to rules, regulations and practices for transportation and car service which were, when issued, and still are, unjust and unreasonable in violation of section 1 of the Act to Regulate Commerce as amended, particularly paragraphs 11 and 12 of said section 1, and unduly preferential of Complainant's competitors and prejudicial of Complainants in violation of section 3 of said Act:

Wherefore, Complainants pray that Defendant may be required to answer the charges herein; that, after due hearing and investiga-
[fol. 148] tion, an order be made commanding said Defendant to cease and desist from the aforesaid violations of said Act to regulate commerce, and said Acts amendatory thereto, and of said Transportation Act, 1920; and to establish and put in force and apply in future to the transportation of coal in interstate commerce between said joint mines in West Virginia and destination points in other States, and to the car service in connection therewith, in lieu of the rules, regulations and practices at present in operation and effect with respect to distribution of empty coal cars at joint mines, such other rules, regulations and practices as the Commission may deem reasonable and just and non-discriminatory, and that such further order or orders be made as the Commission may consider proper in the premises.

The New River Company, White Oak Coal Company, White Oak Fuel Company, Stuart Colliery Company, Dunnloop Coal & Coke Company, Beckley Coal & Coke Company, Mabscott Coal & Coke Company, Cranberry Fuel Company, By Carmalt, Hagerty & Wheeler, Attorneys. James W. Carmalt, Of Counsel. December 20, 1920.

[fol. 149] EXHIBIT "A" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION, WASHINGTON

Notice to Carriers and Shippers

March 2, 1920.

The supply of cars available for the transportation of coal is insufficient to meet the demand. Unusual movements incident upon the strike of coal miners has brought about an abnormal location of cars. It is desirable that the proper relocation of cars shall be brought about as rapidly and with as little confusion as is possible. Critical situations still exist in which fuel for essential industries and purposes must be provided. The railroads and the coal operators have all been working under the uniform mine rating and car distribution rules established by the Railroad Administration and those rules seem to be generally satisfactory and to meet with general approval.

To the end that conflicting and contradictory rules on different roads and in different fields may be avoided in the unusual conditions which now exist in the industries and on the roads, the Commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial and especially during the remainder of the early spring the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS-31 (Revised) be continued in effect.

George B. McGinty, Secretary.

[fol. 150] EXHIBIT "B" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION, WASHINGTON

Notice to Carriers and Shippers

April 15, 1920.

The supply of cars available for the transportation of coal con tinues insufficient to meet the demand. In view of the cessation Government control of coal production and distribution, effecti April 1, 1920, and in order that railroad fuel requirements may b reasonably met without the necessity of carriers resorting to con fiscation of commercial coal, it becomes necessary to amend ou notice to carriers and shippers dated March 2, 1920, and our recom mendation therein to read as follows:

The Commission recommends that until experience and carefu study demonstrate that other rules will be more effective and ben ficial, the uniform rules as contained in the Railroad Administra tion's Car Service Circular CS 31 (Revised) be continued in effec except that rule 8 as contained in said circular should be amende to read:

8. Private cars and cars placed for railroad fuel loading in accord ance with the decisions of the Interstate Commerce Commission i R. R. Com. of Ohio et al., v. H. V. Ry. Co., 12 I. C. C., 398, and Trac v. Chicago & Alton Railroad Co. et al., 13 I. C. C., 451, will be desig nated as "assigned" cars. All other cars will be designated as "un assigned" cars.

The Commission is of opinion that an emergency exists requirin immediate action, and in exercise of the authority conferred b paragraph (15) of Section 1 of the interstate commerce act, a amended by Section 402 of the transportation act, 1920, hereby sus [fol. 151] pends the operation of the existing rule 8 and directs th observance by all carriers by railroad subject to the interstate com merce act of rule 8 modified as above, effective April 16, 1920, an until the further direction or order of the Commission:

By the Commission:

George B. McGinty, Secretary

[fols. 152 & 153] Affidavit to annexed paper omitted in printing

[fol. 154] EXHIBIT B TO AMENDED ANSWER

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 12081

FAIRMONT & CLEVELAND COAL COMPANY

v.

THE BALTIMORE & OHIO RAILROAD COMPANY

Docket No. 12082

FAIRMONT & CLEVELAND COAL COMPANY

v.

MONONGAHELA RAILWAY COMPANY

Docket No. 12083

THE NEW RIVER COMPANY et al.

v.

THE VIRGINIAN RAILWAY COMPANY

Docket No. 12084

THE NEW RIVER COMPANY et al.

v.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

Petition for Reconsideration, Reargument, and Consolidation with Docket No. 12362, Bell & Zoller Coal Company et al. v. Baltimore & Ohio Southwestern Railroad Company et al.

Now come the following named interveners in the above entitled proceedings, to-wit: Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, Turkey Knob Coal Company, Coal [fol. 155] Run Coal Company, Branch Coal Company, Beechwood Coal & Coke Company, Greenwood Coal Company, Laurel Creek Coal Company, Quinnimont Coal Company, Maryland Coal & Coke Company, Star Coal & Coke Company, Ephriam Creek Coal & Coke Company, Stover Coal Company, Northern West Virginia Coal Operators' Association, and Fifth & Ninth Districts Coal Bureau, and by this, their petition for reargument, reconsideration, and consolidation of these cases with Docket No. 12362, Bell & Zoller Coal Company et al. v. Baltimore & Ohio Southwestern Railroad Company et al., now pending for hearing, respectfully show:

1. That, while these proceedings were instituted by the filing of four separate complaints by operators of joint mines against the rail-

roads serving their mines, it developed at the hearing that the defendants in two of the cases were ready and willing to grant the relief prayed for, while the defendants in the two remaining cases assumed what amounted to a neutral position. The rule of car distribution attacked in all the cases was really defended by operators of local mines, your petitioners herein, with the result that the consolidated proceeding resolved itself into one between the operators of joint mines on the one hand and the operators of local mines on the other. In view of these facts your petitioners represent that the Commission should give the same consideration to this petition as it would give to a similar petition by the defendant railroads.

2. That the Examiner who presided at the hearing herein made no report of proposed findings of fact and conclusions, as is the [fol. 156] general practice in proceedings of this importance, and consequently your petitioners have not been afforded the same full and complete opportunity to submit their case to the Commission as has been and is customarily afforded to the parties in other proceedings.

3. That in the decision herein (Fairmont & Cleveland Coal Co. v. Baltimore & Ohio R. R. Co., 62 I. C. C. 269) the Commission gave no consideration whatsoever to the most important contentions urged by the intervening local-mine operators, although due consideration was given to two minor contentions urged by them and to all the contentions made by the complaining joint-mine operators. On page 273 of the report it is stated:

"The efforts of the local-mine operators were directed mainly to showing that a greater percentage of cars were left over at joint mines than at local mines; that the capacity of the present sidetracks at joint mines would be insufficient to take care of the equipment if they were permitted to order their gross rating from each carrier; and the alleged advantage which the joint mine has by reason of being able to ship over the road having the greater car supply."

The above statement that the efforts of the local-mine operators were directed mainly to the three matters referred to is in error. The local-mine operators made no contention regarding the capacity of sidetracks, and the matter is not even mentioned in their brief (see note). The report of the Commission shows that due consideration [fol. 157] was nevertheless given to it and the other matters referred to in the above quotation, as they are analyzed in detail on pages 274 and 275 of the report. But nowhere in the report is even the slightest mention made of the major contentions of the intervening local-mine operators.

NOTE.—The writer of the report evidently accepted the statement of the contentions of the local-mine operators contained in the initial brief (page 24) of the joint-mine operators. At the hearing Counsel for the local-mine operators asked a few questions regarding the capacity of joint-mine sidings, but made no contention based thereon.

(a) Your petitioners show that in the report herein the Commission does not so much as refer to their contention that—

Any request by a coal mine operator for more cars than the mine can load and have ready for shipment on a given day is not a reasonable request within the meaning of paragraph 4 of section 1 of the act.

This contention appears on pages 15-16 of the brief for the West Virginia local-mine operators. It was also referred to at length at the oral argument before the Commission, in the course of which the following colloquy took place between Mr. Commissioner Potter and counsel for the complaining joint-mine operators:

"Commissioner Potter: Mr. Carmalt, suppose a mine has a capacity of 20 cars a day, and suppose it orders or receives five cars from Line A. Is not the capacity of that mine thereby reduced to 15 cars?

Mr. Carmalt: Absolutely, yes, sir.

Commissioner Potter: And should not Line B then prorate on basis of a 15-car capacity, and not a 20-car capacity?

Mr. Carmalt: Not a 15-car capacity; but, allow it its right to assert its full rating, provided it does not get, in the aggregate, more than 20 cars from the two roads. That is my contention.

[fol. 158] Commissioner Potter: Is not the spirit or intent that the shippers shall prorate their shipments according to the amount they have to ship over the two lines.

Mr. Carmalt: Yes, sir; I think so. (Record, 398-399.)

* * * * * * *

Commissioner Potter: Mr. Carmalt, suppose a mine has an actual capacity to produce 20 carloads of coal per day. Suppose it sells five carloads per day to a power plant located at the mine mouth; so that it actually has power to ship commercially only 15 cars per day. Now, what should be the rating of that mine?

Mr. Carmalt: Fifteen cars, because the rating so provides that it is based on the shipments made in the aggregate during the preceding month.

Commissioner Potter: If its rating should be reduced by the amount of coal consumed at the mine mouth, why shouldn't it be reduced similarly by the amount of coal shipped over Line A, if you please?

Mr. Carmalt: Your theory being that that is a physical limitation upon the mine to ship.

Commissioner Potter: Yes. In other words, should not you work it out, not on basis of 100 per cent of capacity, but whatever you get from one line? Should not that be deducted in determining your capacity rating——

Mr. Carmalt: I think, as I said, that that is the strongest argument that can be made toward the limitation of the right of the junction point mine to ship. But why should that limitation be made in order to prevent discrimination? I do not think that discrimination exists.

Commissioner Potter: Is not that necessary in the interest of honesty? If a man had ten carloads of applies to ship, you would not permit him to represent that he had twenty carloads to ship, and thus obtain cars on basis of twenty carloads. If a man only has ten cars of coal to ship, why should you permit him to represent that he [fol. 159] has twenty?" (Record, 410-411.)

The Commission has passed upon this question in other cases and has uniformly held that in times of car shortage no shipper has the right to receive cars based on orders in excess of his capacity to load on a given day. California Fruit Growers' Exchange v. S. P. Co., 12 I. C. C. 553; Railroad Commission of Iowa v. C. R. I. P. Ry. Co., 47 I. C. C. 396; Farmers' Elevator Co. v. C. M. & St. P. Ry. Co., 47 I. C. C. 475; Tanner & Co. v. C. B. & Q. R. R. Co., 53 I. C. C. 401. The doctrine of these cases is that when carriers are unable to supply 100 per cent of the demands upon them, they should divide their facilities of carriage in accordance with the quantity of goods which the different shippers have ready for immediate shipment, i. e., the quantity of goods which the different shippers can actually or constructively tender for transportation at the time of the demand for service. While the commodities involved in the cases cited were commodities susceptible of actual tender at the time of the demand for cars, while generally speaking coal is not, it was said in the Tanner Case, supra (page 406), that—

"Coal is shipped as mined and the amount that may be considered ready for shipment is the amount that can be mined, loaded, and forwarded from day to day."

While, in the California Fruit Growers' Association Case, supra, it was held specifically (page 560) that—

"A mine can not in good faith ask for more cars than it can load."

[fol. 160] The decision herein is directly in the teeth of that doctrine as it will permit a joint mine to make a theoretical tender of 150 per cent of its capacity and to receive cars on that basis. Such a basis is purely artificial and to permit it to be the foundation of a legal right would transgress the letter and spirit of the Interstate Commerce Act.

(b) Your petitioners further show that the report of the Commission herein makes no reference to the important contention that—

Paragraph 12 of section 1 of the act requires carriers in times of car shortage, to make a pro-rata distribution of coal cars among the mines by maintaining and applying just and reasonable ratings of the mines and counting each and every car furnished to or used by any such mine against the mine.

This contention was made on pages 17-23 of the brief filed by the West Virginia local-mine operators, and on pages 7-8 of the brief filed by the Fifth and Ninth Districts Coal Bureau. It was referred

to at length at the oral argument both by counsel for the local-mine operators (Record, 433-438) and by counsel for the complaining joint-mine operators (Record, 406-409).

It is impossible to reconcile the conclusions of the Commission herein with the amended statute. The ratings of the mines are not in issue, consequently it must be presumed that they comply with the law and are just and reasonable. In the distribution of coal cars in the times of car shortage, the amended statute requires that mine ratings (which, bear in mind, are presumed to be just and reasonable [fol. 161] so far as these cases are concerned) be not only maintained but also applied and furthermore that there be counted against the mines each and every car furnished to or used by any such mines for the transportation of coal. Your petitioners submit that if mine ratings are applied and each and every car used by the mines is counted, it will be mathematically impossible to permit one mine with a rating of 20 cars per day to receive equipment on the basis of an order for 20 cars and another mine with the same rating to receive cars on the basis of an aggregate order for 30 cars.

At the argument, counsel for the complainant joint-mine operators contended that the requirement of the statute "to count each and every car furnished to or used by any such mine for transportation of coal against the mine" was merely an incident of the requirement "to maintain and apply just and reasonable ratings." He stated "that the purpose of the counting of the cars was to establish reasonable ratings, and it is used in that connection." If the language of the law made it the duty of carriers to maintain just and reasonable ratings by counting each and every car furnished, there would be some support for counsel's contention. But the law does not read that way. The law makes it the duty of carriers to maintain and apply just and reasonable ratings and to count each and every car furnished to or used by any mine for the transportation of coal against the mine. The law makes the duty to count each and every car furnished to or used by the mine separate and distinct from the duty to maintain and apply just and reasonable ratings.

The question as to the correct interpretation of the particular para- [fol. 162] graph in the new law under which the complaint herein was filed is naturally one of the principal issues involved. The law requires the Commission to "execute and enforce the provisions of the Act," and consequently your petitioners submit that they have the right to know where the Commission stands on paragraph 12 of section 1 so far as this case is concerned.

(e) Your petitioners further show that, although the Commission's report refers to and analyzes all the contentions of the joint-mine operators, it does not even mention the contention made by the local-mine operators that—

To permit joint mines to receive cars based on aggregate orders in excess of their daily ratings, and thus to have a greater opportunity to use the blanket rates than local mines of the same ratings which are required to limit their orders to their ratings, would be

inconsistent with the fundamental principles underlying the group adjustment of rates.

This contention was made on pages 31–35 of the brief for the West Virginia local-mine operators, and was referred to at the oral argument. (Record, 442–443.)

All the complaining joint mines are located in districts wherein the rates from a wide expanse of territory are blanketed to all consuming markets. The effect of the decision of the Commission herein is to give joint mines a greater relative opportunity to ship on the blanket rates than is given to local mine with like ratings, although the fundamental purpose of the group adjustment is to [fol. 163] put all the mines upon an equality. Both the fundamental purpose and the particular groups in which these mines are located have been approved by the Commission. For example, the joint mine of the Fairmont & Cleveland Coal Company, the titular complainant herein, is located in the heart of the Fairmont District approximately 100 miles east of the western hem of the common rate blanket to points in so-called "affected territory" north of the Ohio River. In Hitchman Coal & Coke v. B. & O. R. R. Co., 16 I. C. C. 512, the Commission declined to break the blanket by prescribing lower than the group rates from certain local mines along the western hem of the blanket to points north of the Ohio River. In other words, the Commission refused to authorize a rate advantage commensurate with the geographical advantage of the complainant mines. Is it just, is it fair, after declining a rate advantage commensurate with the geographical advantage of local mines along the border of a group on the broad ground that such action would violate the fundamental principle of equality underlying the group adjustment, to bestow an extra car-supply advantage on a single joint mine in the heart of the same group that will clearly violate the group principle and every other principle of equality? Your petitioners submit that they are entitled to the Commission's answer to this question.

(d) Your petitioners further show that in its report the Commission ignored the contention that—

To permit joint mine to receive cars to a greater percentage of their ratings than local mines would gradually deprive the latter of their labor supply, a result which should be avoided in the public interest.

[fol. 164] The contention is referred to on pages 30–31 of the brief for the West Virginia interveners.

The importance of this feature of the situation has been recognized by the Commission. Hillsdale Coal & Coke Co. v. P. R. R. Co., 19 I. C. C. 365; Bulah Coal Co. v. P. R. R. Co., 20 I. C. C. 52, 54. In the Bulah Coal Co. Case, the Commission said:

"One of the evils lying at the root of the trouble is that the mine having a larger or more constant supply of cars may not only be operated at less cost, but what is equally if not more important, such a mine is able to attract miners from the other mines because of the

assurance it gives of a more constant opportunity to earn a daily wage."

The relative working time of mines depends absolutely upon their relative car supply. The miners employed in a local mine with a daily rating of 20 cars should be protected in their right to work as many hours per day as the miners employed in a joint mine with a daily rating of 20 cars. The Supreme Court of the United States has held (Texas & Pacific Ry. v. I. C. C., 162 U. S. 197, 219) that "all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers should be considered by the tribunal appointed to carry into effect and enforce the provisions of the Act," consequently the Commission should not ignore the interest and welfare of the mine employees in this proceeding.

Your petitioners submit and earnestly contend that, inasmuch as the Commission passed upon all the contentions of the joint-mine operators, it should pass upon the above contentions of the local-mine operators before finally adopting a rule which will concededly [fol. 165] prejudice the local-mine operators and their mine employees and favor the joint-mine operators and their mine employees.

4. Your petitioners further represent that the specific findings of fact in the report show on their face that the Commission erred in concluding that Rule 4 of Circular CS-31, Revised, is "unreasonable and unduly prejudicial to joint mines and unduly preferential of local mines." The rule provides that the aggregate rating of a joint mine, like the order of a local mine, must be limited to 100 per cent of its rating. The Commission holds that, in order to remove undue prejudice against joint mines and undue preference in favor of local mines, joint mines may be reasonably permitted to order from both railroads 150 per cent, instead of 100 per cent, of their ratings and to receive cars up to their ratings on that basis.

(a) On page 274 of the report of the Commission are the only specific findings of fact as to the actual effect of the operation of the rule in issue. These findings are as follows:

"The joint mines in the New River District, during the month of August, 1920, under the operation of the rule here complained of, received 1,392.6 cars from the Chesapeake & Ohio and 1,881.8 cars from the Virginian, or 167.3 cars more from the Chesapeake & Ohio and 48.2 cars less from the Virginian than they are entitled to. If they had been accorded a similar car supply as local mines with like ratings located on defendants' lines they would have received 2,104.9 cars from the Chesapeake & Ohio and 3,471.1 cars from the Virginian. These joint mines received 183.6 cars less on the Chesapeake & Ohio and 714.6 cars less on the Virginian than [fol. 166] they would have been entitled to during the said month under the rule approved by us in the Illinois Case."

The figures in the above findings were taken from Complainants' Exhibits 12 and 13, which show on their face that they cover only

the 11 joint mines of the New River Company and not, as the findings state, the (55) joint mines in the New River District. In condensed statement form, the figures are as follows:

	Number of cars entitled to during August, 1920	
	Under 100 per cent rule	Under 150 per cent rule
Supply of New River Company Joint Mines	3058.9	4172.6
Supply of Local Mines with like ratings on Chesapeake & Ohio	2104.9	2104.9
Supply of Local Mines with like ratings on Virginian	3471.1	3471.1
Average supply of Local Mines with like ratings on both roads	2788.0	2788.0
Excess supply of New River Joint Mines over average supply of local mines with like ratings on both roads	270.9	1384.6
	9.7%	51.4%

The above table, compiled from the Commission's own findings in this case, shows that even under the 100 per cent rule against which they are complaining, the joint mines have a substantial advantage in car supply (9.7 per cent on the average in August, 1920) over local mines with like ratings in the same district. While, during the representative month referred to, the joint mines mentioned received 412.2 cars less than local mines with like ratings on the Virginian, they received 954 cars more than local mines with like ratings on the Chesapeake & Ohio, or a net average advantage of 270.9 cars, and this showing was made under the very rule which the Commission condemns herein.

(b) The record (Complainants' Exhibits 16, 17, and 18) contains similar figures regarding the relative car supply of the Parker [fol. 167] Run Mine, the joint mine of the Fairmont & Cleveland Coal Co., the titular complainant herein, but for some reason the report of the Commission contains no reference thereto. The figures are as follows and cover the month of April, 1920:

	Number of cars entitled to during April, 1920	
	Under 100 per cent rule	Under 150 per cent rule
Parker Run Joint Mine	398	484
Local Mine with like rating in same district on Baltimore & Ohio	397	397
Local Mine with like rating in same district on Monongahela	266	266

This table, compiled from complainants' exhibits in this case, shows that the joint mine complainant in Nos. 12081 and 12082 actually received a better car supply than local with like ratings on the same roads in the same district under the very rule which the Commission holds is unduly prejudicial to this same joint mine.

The record herein (Exhibit No. 38) further shows, although the report of the Commission make no reference thereto, that during the period from March 1, 1920, to December 31, 1920, two other joint mines (Grant and Morgan) in the Fairmont District served by the Baltimore & Ohio and Monongahela received 3409.6 cars, or 55.1 per cent of their aggregate orders whereas all local mines and joint mines in the same district on those roads received (including assigned cars on the Monongahela) 203,543 cars, or 48 per cent of their aggregate orders. In other words, the two joint mines referred to received 7.1 per cent better car supply than the average of the local mines and joint mines.

The record also shows (Exhibit 39) that, during the period, March 1, 1920 to January 1, 1921, all the joint mines in the New River [fol. 168] District secured sufficient cars to run them the equivalent of 157.13 full working days, whereas the local mines in the same district secured sufficient cars to run them only 123.78 full working days. In its report, the Commission criticised this comparison as follows:

"The total cars supplied by both roads are divided by the average aggregate rating of both roads, and the result is shown as the equivalent of the number of full days worked. This statement is subject to the criticism that it takes the aggregate mine ratings rather than the number of cars ordered."

This criticism ignores the testimony of the car distributor of the New River Complainants to the effect that throughout the period referred to the joint mines ordered 100 per cent of their ratings from both the Chesapeake & Ohio and Virginian and that the roads reduced these orders 50 per cent, making the aggregate orders a total of 100 per cent of the ratings (Record, 84). But even though the mines, joint or local, did not order up to 100 per cent of their ratings, they had a right to do so under the rules, and consequently it is perfectly proper to divide the total cars received by the joint mines by their aggregate ratings, and the total cars received by the local mines by their aggregate ratings, in order to ascertain how the two classes of mines fared during a period when the rule attacked by the joint mines was in full force and operation.

(c) Furthermore, the Commission has passed upon this same question in two recent cases filed by Illinois operators. During Mines Co. v. Director General, 61 I. C. C. 265, 266; Ridge Coal Mining Co. v. M. P. R. R. Co., 62 I. C. C. 259, 261. In the Dering Mines Company Case, the Commission found that——

[fol. 169] "The benefit chiefly sought by complainants, however, is better car supply to the joint mine in times of car shortage. The record shows that the joint mine has an advantage in this respect."

While in the Ridge Coal Mining Company Case, the Commission found that——

"The record establishes that a joint or junction point mine has a decided advantage over a local mine in the matter of car supply as well as in other respects."

The above facts and findings show, and show conclusively, that the Commission erred in condemning the 100 per cent rule. The Commission's own findings of fact as to the actual operation of the rule prove that joint mines already have a substantial advantage over local mines with like ratings; furthermore, almost contemporaneously with the decision herein the Commission squarely finds in two other decisions that joint mines have a "decided advantage" over local mines "in the matter of car supply as well as in other respects." Under the circumstances there is absolutely no warrant for the Commission giving the joint mines an additional advantage of 50 per cent or any other per cent.

5. Your petitioners further show that the Commission erred in predicating its decision herein upon In re Irregularities in Mine Ratings, 25 I. C. C. 286. That proceeding was merely an arbitration proceeding with only one carrier respondent and, the other carriers serving joint mines not being parties, the Commission could not have been fully advised of the relative car supply of joint mines versus local mines with like ratings for any definite period. None of the major contentions urged herein by the local-mine operators [fol. 170] was urged in that case. Furthermore, that case was decided nearly nine years ago and in the meantime circumstances and conditions affecting the supply of cars to coal mines have radically changed and even the law applicable thereto amended.

The Commission erred in following In re Irregularities in Mine Ratings, decided in December, 1912, when it had before it Dering Mines Co. v. Director General, supra, and Ridge Coal Mining Co. v. M. P. R. R. Co., supra, decided only four days before the proceeding herein and in which the question of the car-supply advantage or disadvantage of joint mines over local mines in the same general territory (Illinois) as was involved in In re Irregularities in Mine Ratings was specifically passed upon. In striking contrast to the decision in the latter case, wherein the Commission in effect held that under the conditions then existing (1912) the 100 per cent rule operated to the undue advantage of local mines, the Commission found in the two recent decisions referred to that under the conditions existing in 1920-1921 the 100 per cent rule operated to the "decided advantage" of joint mines.

The Commission further erred in accepting and relying upon In re Iregularities in Mine Ratings as authority for its decision herein when there was pending for hearing before it a proceeding involving the same general questions affecting local mines and joint mines in the same general territory, to-wit: Docket No. 12362, Bell & Zoller Coal Co. et al. v. Baltimore & Ohio Southwestern R. R. Co.

et al. The hearing of the latter case will be a virtual rehearing of In re Irregularities in Mine Ratings with all Illinois railroads as respondents and consequently your petitioners submit that the Commission should have proceeded with that rehearing before accepting and affirming the conclusions reached in 1912.

[fol. 171] Your petitioners are informed and believe, and therefore state the fact to be, that there is a greater number of joint and junction-point mines in the state of Illinois, the territory involved in the Bell & Zoller Coal Co. Case, than in all the rest of the country combined. The joint-mine question has developed to a greater extent and has more ramifications in that state than in any state or district of the United States, therefore evidence of present conditions in that state is absolutely essential to the proper determination of any joint-mine rule of general application. In this connection, the following colloquy between Chairman Clark and counsel for the joint-mine operators at the oral argument herein is referred to:

"Chairman Clark: And, so far as outside evidence go, C. S. 31 is in effect in the Illinois district, and we are not hearing any complaints about it.

Mr. Carmalt: Oh, yes; you are. I beg your pardon. You have complaints here from practicaly all joint mines in the Illinois district.

Chairman Clark: I did not know that.

Mr. Carmalt: There are here. I do not know that any testimony has been taken; but they are both here. I believe fully that whatever rule the Commission adopts should be the rule adopted in all territory. I do not think we have any special rights in the New River district or in the Fairmont district." (Record, 422.)

6. Your petitioners further show that the application of the rule prescribed by the Commission is indefinite and uncertain in that the rule does not define the qualifications of a joint mine. The rule prescribed is apparently intended to be one of general application, [fol. 172] consequently it should specify the particular classes of mines which are entitled to receive the preferential car supply contemplated by its terms. If this is not done, different railroads are very likely to treat the same classes of mines in different ways so far as car distribution is concerned. This is true today in respect to the defendants herein.

For example, the record shows that the Chesapeake & Ohio and Virginian treat all mines on the Kanawha, Glen Jean & Eastern as joint mines. The latter line is an independent road, owning coal carrying equipment, and having no trackage arrangements with either of the two trunk-line connections named. (Record, 359, 372-373.)

It further appeared that all mines on what is known as the Stone Coal Branch in the New River District are treated as joint mines by the Chesapeake & Ohio and Virginian. This line is owned jointly by the two roads named. The record shows that both the

Chesapeake & Ohio and the Virginian had rights of way and were ready to build along Stone Coal Creek, but that later they agreed to build a singe line in order to avoid the double expense. The mines are served with cars by locomotives and crews of the Virginian, the expenses of which are divided between the two proprietary lines. (Record, 301-302, 315-316.)

On the other hand, the mines on the Monongahela Railway, which *is* owned jointly by the Pennsylvania and Pittsburgh & Lake Erie, are treated as local mines. The proprietary roads originally intended, and in fact started, to construct two lines into the territory served by the Monongahela, but later agreed "to construct and establish one line of railway" in order to avoid the "great cost involved [fol. 173] in constructing independent roads." While, under the agreement between the proprietary lines, they have the right to run their own locomotives and crews over the Monongahela, the mines on the Monongahela are served directly by the locomotives and crews of the Monongahela. The Monongahela owns no coal carrying equipment, and it must therefore look to the proprietary lines for its car supply. The Monogahela, on behalf of the mines on its line, orders the cars from the Pennsylvania and Pittsburgh & Lake Erie, in the same manner that the mines on the Stone Coal Branch order the cars from the Chesapeake & Ohio and Virginian. The only difference in the two situations is that the Monongahela is separately operated, while the Stone Coal Branch is not. But, on account of the joint ownership, the Monongahela must be regarded as part and parcel of the proprietary roads. C. M. & St. P. Ry. Co. v. Minneapolis Civic & Commerce Asso., 247 U. S. 490; Pacific Lumber Co. v. N. W. P. R. R. Co., 51 I. C. C. 738, 757; Richmond Chamber of Commerce v. S. A. L. Ry., 44 I. C. C. 455, 460. (Record, 221, 228; Ownership of Little Kanawha R. R. Co., 36 I. C. C. 560, 613, 638.)

In view of the above facts, your petitioners submit that, if the Commission adheres to its decision herein and insists upon the application of the 150 per cent rule or any other rule permitting joint mines to receive cars based upon orders for more than 100 per cent of their ratings, it should define the qualifications of a joint mine. In this connection your petitioners suggest the following definition:

This rule (the rule prescribed) shall apply to all mines which two or more carriers owe a legal obligation to serve with cars.

[fols. 174 & 175] Wherefore, your petitioners earnestly pray that the Commission reopen these cases for further consideration, that the report and decision herein be treated merely as a tentative report, and that these cases be set for further argument along with Docket No. 12362, Bell & Zoller Coal Co., et al. v. Baltimore & Ohio

Southwestern R. R. Co., et al., and for such other relief as may be deemed meet and just in the premises.

Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, Turkey Knob Coal Company, Coal Run Coal Company, Branch Coal Company, Beechwood Coal & Coke Company, Greenwood Coal Company, Laurel Creek Coal Company, Quinnimont Coal Company, Maryland Coal & Coke Company, Star Coal & Coke Company, Ephriam Creek Coal & Coke Company, Stover Coal Company, By G. H. Caperton, George T. Bell, Their Agents and Attorneys Herein. Northern West Virginia Coal Operators' Association, By George S. Brackett, George T. Bell, Its Agents and Attorneys Herein. Fifth & Ninth Districts Coal Bureau, By P. H. Greenlaw, George T. Bell, Its Agents and Attorneys Herein. Washington, D. C., August 25, 1921.

[fol. 176] EXHIBIT C TO AMENDED ANSWER

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 12081

FAIRMONT & CLEVELAND COAL COMPANY

vs.

BALTIMORE & OHIO RAILROAD COMPANY

Docket No. 12082

FAIRMONT & CLEVELAND COAL COMPANY

vs.

MONONGAHELA RAILWAY COMPANY

Docket No. 12083

THE NEW RIVER COMPANY et al.

vs.

THE VIRGINIAN RAILWAY COMPANY

Docket No. 12084

THE NEW RIVER COMPANY et al.

vs.

THE CHESAPEAKE & OHIO RAILWAY

Petition to Reopen

Come now the Fairmont & Cleveland Coal Company, The New River Company, White Oak Fuel Company, White Oak Coal Com-

pany, Stuart Colliery Company, Dunnloop Coal & Coke Company, [fol. 177] Beckley Coal & Coke Company, Mabscott Coal & Coke Company and Cranberry Fuel Company, complainants in the above entitled proceedings, and with them the East Gulf Coal Company, Pemberton Fuel Company, Prince-Wick Coal Company, Pickshin Coal Company, Wood-Sullivan Coal Company, Tommy Creek Coal Company, Lillybrook Coal Company, Beckley Fire Creek Coal Company, E. E. White Coal Company, New River Collieries Company, Raleigh Coal & Coke Company, Gulf Smokeless Coal Company, Price Hill Colliery Company and E. C. Minter Coal Company, interveners in the said proceedings and petition this Honorable Commission to reopen these proceedings to take further testimony and for reargument upon brief, and orally, and as grounds for said petition, respectfully show:

I. That the order dismissing the complaints in these proceedings, entered on the 11th day of December, 1922, in so far as it purports to give authority to the railroad defendants to restore Rule 4 of Car Service Circular CS-31-Revised, is violative of property rights of your petitioners and unmindful of the common carrier obligations of the railroad defendants and is, therefore, without legal effect.

Your petitioners, by reason of their foresight and investment, have so located their properties as to receive, of right, the service of two or more carriers. In times of car shortage as well as in times of car plenty these coal operations have the legal right under the Interstate Commerce Act, and under the common law, to demand service from each of the railroads which hold themselves out to serve the mine tipples of your petitioners. Under Rule 4 of CS Circular 31 Revised, one or the other, or both of the railroads serving the [fol. 178] tipples are excused, in times of car shortage, from the obligation to serve the tipple by reason of service that may have been afforded by the other carrier. Illustrating this proposition, it may be assumed that a joint mine has a rating of twenty cars per day; that it is served by two railroads, one of which has a 60 per cent and the other a 40 per cent car supply and that the mine orders twenty cars from each railroad. Road A, having a 60 per cent car supply, will furnish 12 cars. The mine still has a capacity to ship 8 cars but, under the rule now approved by the Commission, Road B is not permitted to honor the order which the mine has made and the order of the Commission authorizes Road B under the above circumstances to refuse to honor the order of the mine for cars because Road A has given it 60 per cent of its capacity to ship. Such is not the law, either at common law or under the provisions of the Interstate Commerce Act.

II. That the Interstate Commerce Commission is without power under the Act to enter an affirmative order to require the carriers to restore Rule 4 of Circular CS-31 Revised. The Interstate Commerce Act provides, and the Supreme Court of the United States has again and again held that said Act does not take away or abridge the rights of shippers against common carriers or the obligations of such common carriers at common law. The Interstate Commerce

Act is supplementary to the common law and gives to shippers additional rights and crystallizes the obligations of common carriers. As shown by the illustration in the last preceding paragraph, the joint mine, like any other shipper, has the right to demand service from each carrier serving it in the same proportion of its available [fol. 179] equipment as have all other shippers on each railroad and the Interstate Commerce Commission cannot put a limitation upon this right without exceeding its statutory powers.

III. Rule 4 of Circular CS-31 Revised is inherently unreasonable. The Commission, in its report of December 11th, in these proceedings, states the operation of Rule 4 as follows:

"The operation of rule 4 is shown by the following example: A joint mine with a gross daily rating of 50 cars located on carriers A and B orders all of its cars from carrier A which has an 80 per cent car supply. The joint mine will receive the same number of cars as a local mine with a daily rating of 50 cars on carrier A. However, if carrier B has a 50 per cent car supply and the joint mine divides its order equally between the two carriers it will receive 80 per cent of 25 cars, or 20 cars, from carrier A, and 50 per cent of 25 cars, or 12.5 cars, from carrier B, a total of 32.5 cars compared with 40 cars received by the local mine on carrier A. Should the joint mine order more than half its cars from the carrier with the greater car supply this will change the figures somewhat, but in no instance will the joint mine receive as many cars as the local mine served by carrier A if the orders are divided. The complainants concede that the joint mine will, in the aggregate, receive more cars than the local mine located on the carrier with the lesser car supply, and it possibly may receive more cars on the average than the local mines of similar rating on both carriers."

Having previously recited that the joint mine, by reason of its location, has important advantages to which it is entitled and in the [fol. 180] reasonable enjoyment of which it should be protected, the Commission proceeds, by the paragraph above quoted, to illustrate that its approval of Rule 4 seriously impairs the advantages set out, for instance:

"The joint mine has available a more extensive and a more varied market for its coal."

The mine having established and built up these markets in time of car plenty, the Commission proceeds to take the advantage away in times of car shortage by the working of the rule as it itself sets it out and puts such mine on a lower basis than the local mine on the road having the larger car supply in every case and down nearer to the level, if not actually below the level, of the average of the local mines on both railroads. The operation of Rule 4 in times of car shortage puts the joint mine in a position of disadvantage by reason of its location.

IV. The operation of Rule 4 is prejudicial of the joint mine and preferential of the local mine. It must appear obvious from the quotation from the opinion regarding the operation of the rule that the joint mine located on railroads A and B received under Rule 4 less cars from each railroad, proportionately, than such railroad serves to its local mines. The Commission insists that the aggregate car supply received by the joint mine from both railroads must be taken as a basis of comparison with the local mines car supply, for purposes of consideration of Section 3 of the Interstate Commerce Act. Your petitioners deny that Section 3 of the Act authorizes the Commission to predicate an order of undue prejudice against a railroad by reason of the practices of another carrier.

[fol. 181] "If this were not so, the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers. If that rule should prevail, only uniformity in local privileges and practices, or the cancellation of all joint rates, could afford to carriers the assurance that they were not in some way violating the provisions of Paragraph 3. What Congress sought to prevent by that section, as originally enacted, was not differences between localities in transportation rates, facilities, and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act 1920, February 28, 1920, chap. 91, 41 Stat. at L. 456, nor any earlier amendatory legislation, has changed, in this respect, the purpose or scope of Paragraph 3."

(Central Railroad of New Jersey vs. United States, — U. S., — (1921.)

V. That the legal right of the joint mine is to receive its pro rata of the available cars of each railroad with the single limitation, in the public interest, that it shall not receive a greater number of cars in the aggregate than it has capacity to load. The decision of the Commission in the so-called Illinois case, 25 I. C. C. 286, was a limitation upon this right and not an extension of it. The rule laid down in that case, and approved by the Commission in the first decision of the instant cases, 62 I. C. C. 269, was acquiesced in by petitioners but only as it represented a practical way of giving certainty to the basis of ordering cars which would give to the joint mine a close approximation of the car supply to which it is legally entitled. The case made by the opponents of your petitioners has throughout been based upon the erroneous conception that undue prejudice and preference can be arrived at in the orders for cars. The contention of [fol. 182] your petitioners throughout these cases has been that preference or prejudice can only be determined upon the supply of cars. If a joint mine receives no more than its proportionate share of cars from each railroad the local mines on either one have no cause for complaint; if a mine, by reason of its location, receives additional cars from another railroad, to which the local mine under no car distribution rules could be entitled, such additional supply from the second railroad cannot cause a discrimination or prejudice of the local mine on the first road.

VI. The Commission is without power to predicate an order under the Act to Regulate Commerce in order to equalize the running time of mines. As pointed out in the dissenting opinion of Commissioner Potter—

"To do so would be to require discrimination in the use of equipment—not remove it. If a local mine is at a disadvantage it is not because of a transportation problem with which we may deal but because of a labor problem which is not for us."

In so far as the decision of the Commission is predicated upon an advantage that the joint mine may have in a labor supply by reason of the greater running time afforded to it under the rule of the Illinois case, the decision is in excess of the statutory powers of the Commission. Even in this regard, however, the Commission makes no specific finding that there is any advantage to the joint mine in labor supply and there is certainly no evidence in these proceedings upon which to predicate any such finding. To whatever extent such considerations have influenced the decision of the Commission they [fol. 183] would seem to represent a prejudgment of the assigned car rule now pending before the Commission in another proceeding.

VII. That the Commission acted in these cases without sufficient evidence. The Commission in its first decision in these cases found Rule 4 to be unreasonable and prejudicial, and also found what would be the reasonable rule and prescribed the same. The rule it prescribed was, in practical effect, the same as that that had been suggested in the Illinois case, Supra, and it was promptly put in effect by the four defendants in these proceedings. The experience thus had under the rule laid down in those cases was not before the Commission in the instant proceeding. An indication of what that experience was is given in the general investigation of the Commission into the car distribution rules, Docket No. 13896 but not at all in a comprehensive way. Exhibit No. 131 of the Chesapeake & Ohio in that proceeding shows that under the operation of the 75 per cent rule there was less inflation of ratings at joint mines than at local mines. The Commission will understand that the rating rule for joint mines was not in issue in the instant proceedings and no testimony in regard to such ratings was introduced. In fact it was expressly excluded by the Examiner. In the general Car Distribution inquiry it appears, by definite testimony, that the rule for rating joint mines gives to such mines no advantage over the local mines and, in fact, the same method of rating is employed. It is not disputed that the ratings of joint mines are not inflated to the extent as are the ratings of local mines, which, under Circular CS-31 Revised, are in position to and do inflate ratings in times of car shortage to a much greater extent than the joint mines.

[fols. 184 & 185] Wherefore, in view of the considerations above set out your petitioners earnestly pray that the Commission shall reopen these proceedings to take further testimony and to hear further ar-

gument upon such testimony and upon the legal principles that are involved in these proceedings.

Respectfully submitted, August G. Gutheim, James W. Carmalt, Attorneys for Petitioners. Dated at Washington, D. C., January 9, 1923. August G. Gutheim, 8 Jackson Place, Washington, D. C. James W. Carmalt, Southern Bldg., Washington, D. C.

[fol. 186] EXHIBIT D TO AMENDED ANSWER

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket 12081

FAIRMONT & CLEVELAND COAL COMPANY

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY

Docket No. 12082

FAIRMONT & CLEVELAND COAL COMPANY

vs.

MONONGAHELA RAILWAY COMPANY

Docket No. 12083

THE NEW RIVER COMPANY et al.

vs.

THE VIRGINIAN RAILWAY COMPANY

Docket No. 12084

THE NEW RIVER COMPANY et al.

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

Answer of the Slab Fork Coal Company and Other Interveners to Complainants' Petition to Reopen

Now come the following-named interveners in the above-entitled proceedings, to wit: Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, Turkey Knob Coal Company, Coal Run Coal Company, Branch Coal Company, Beechwood Coal & Coke Company, Greenwood Coal Company, Laurel Creek Coal Company, [fol. 187] Quinnimont Coal Company, Maryland Coal & Coke Com-

pany, Star Coal & Coke Company, Ephriam Creek Coal & Coke Company and Stover Coal Company, and by this their answer to complainants' petition to reopen these proceedings, respectfully show:

1. That, contrary to the statement in paragraph one of the petition, reading—

"That the order dismissing the complaints in these proceedings, entered on the 11th day of December, 1922, in so far as it purports to give authority to the railroad defendants to restore Rule 4 of Car Service Circular CS-31-Revised, is violative of property rights of your petitioners and unmindful of the common carrier obligations of the railroad defendants."

these interveners say that the said Rule 4, hereinafter referred to as the 100 per cent rule, fully recognizes the property rights of petitioners and the common carrier obligations of defendants. The 100 per cent rule fully recognizes the right of joint-mine operators to order and receive cars for loading coal from any or all of the railroads reaching these mines, but one of the purposes of the said rule is to compel such operators to accompany their orders for cars with the same bona fide concomitant tenders or setting aside of sufficient coal or sufficient output capacity to load and ship the aggregate number of cars ordered as is required of local-mine operators. The said rule also recognizes the common carrier obligations of defendants, but the obligation of defendants to furnish cars for loading coal is [fol. 188] not called into play unless and until the orders for cars by whomsoever placed are accompanied by actual or constructive tenders of sufficient coal to load the aggregate number of cars ordered on the particular day for which the cars are ordered.

That, in respect to the following statements in paragraph one of the petition—

"Your petitioners, by reason of their foresight and investment, have so located their properties as to receive, of right, the service of two or more carriers. In times of car shortage as well as in times of car plenty these coal operations have the legal right under the Interstate Commerce Act, and under the common law, to demand service from each of the railroads which hold themselves out to serve the mine tipples of your petitioners. Under Rule 4 of CS Circular 31 Revised, one or the other, or both of the railroads serving the tipples are excused, in times of car shortage, from the obligation to serve the tipple by reason of service that may have been afforded by the other carriers."

these interveners say that the 100 per cent rule specifically recognizes the right of joint-mine operators "to receive service of the two or more carriers serving their mines"; that the said rule does not abridge the right of such operators "to demand service from each of the railroads which hold themselves out to serve the mine tipples" of petitioners; that under the said rule none of the railroads reaching joint mines is excused from the obligation to serve such mines by reason of any service afforded by the other carrier or carriers when

the demands for service, i. e., orders for cars, are accompanied by [fol. 189] bona fide concomitant tenders or setting aside of sufficient coal or sufficient output capacity to load the aggregate number of cars ordered on the particular day for which the cars are ordered.

That, in respect to the following statements in paragraph one of the petition—

"Illustrating this proposition, it may be assumed that a joint mine has a rating of twenty cars per day; that it is served by two railroads, one of which has a 60 per cent and the other a 40 per cent car supply and that the mine orders twenty cars from each railroad. Road A, having a 60 per cent car supply, will furnish 12 cars. The mine still has a capacity to ship 8 cars, but, under the rule now approved by the Commission, Road B is not permitted to honor the order which the mine has made and the order of the Commission authorizes Road B under the above circumstances to refuse to honor the order of the mine for cars because Road A has given it 60 per cent of its capacity to ship. Such is not the law, either at common law or under the provisions of the Interstate Commerce Act."

these interveners point out that other rules in Car Service Circular CS-31, Revised, not here in issue and not contested by complainants, require that all orders for cars by whomsoever presented shall be placed the day before the cars are to be loaded, consequently the example illustrated is unworkable, and complainants practically so conceded in their answer (page 5) to interveners' petition for reconsideration and reargument of these cases after the first decision therein. The illustration is unworkable and impracticable because, after Road A had furnished the joint mine with 12 cars on a given day, it would be too late for Road B to honor any orders for cars for [fol. 190] loading on that day. It would not only be physically impossible for Road B to honor any order for cars for loading on that day, but any attempt on its part so to do would be contrary to the rule requiring orders for cars to be placed the day before the cars are to be loaded. Illustrating this proposition it may be assumed that the joint mine with a rating of 20 cars per day referred to in the above quotation from the petition desired to order 20 cars for Tuesday's loading from Road A. Under the rules, this order for cars would have to be placed on Monday, i. e., the day before the cars are desired for loading. On Tuesday Road A places 12 cars at the joint mine, and the mine proceeds to load them. Petitioners say that—

"The mine still has a capacity to ship 8 cars,"

but it is now too late for the mine to order 8 cars for loading on Tuesday from Road B. Road B has already distributed its available cars for loading on that day, and in any event other rules in Car Service Circular CS-31, Revised, require that orders for cars for Tuesday's loading shall be placed on Monday. Contrary to the quoted statement in the petition that the 100 per cent rule in Road B's authority for not honoring on Tuesday an order for 8 cars presented on Tuesday, these interveners say that the physical exigencies

of the situation make it impossible and impracticable for Road B to honor on Tuesday any order for cars presented on Tuesday, and furthermore that other rules, not here in issue and not questioned by complainants, constitute Road B's authority for not attempting to honor on a given day orders for cars presented on the same day. [fol. 191] Furthermore, when the joint mine in the above illustration ordered its daily rating of 20 cars from Road A for Tuesday's loading, it tendered and set aside its entire capacity for that day; it had no coal or capacity left to make the subject of a tender to Road B on that day. Road B is not obligated "either at common law or under the provisions of the Interstate Commerce Act," to pay any attention to, much less attempt to honor, bogus or counterfeit tenders.

II. That, in respect to the following statements in paragraph two of the petition—

"as shown by the illustration in the last preceding paragraph, the joint mine like any other shipper, has the right to demand service from each carrier serving it in the same proportion of its available equipment as have all other shippers on each railroad and the Interstate Commerce Commission cannot put a limitation upon this right without exceeding its statutory powers"—

these interveners say that the right of a joint mine operator to demand service is measured, like that of any other shipper, by his ability and capacity to accompany his demands by a bona fide, concomitant tender or setting aside, actual or constructive, of the property to be shipped as of the day on which it is to be shipped. Under the rules a local mine is not permitted to order cars in excess of its rating on any day, i. e., its order is not recognized to the extent that it is unaccompanied by a bona fide, concomitant tender of capacity to load the number of cars ordered. Under the 100 per cent rule, a [fol. 192] joint mine is not permitted to order cars in excess of its aggregate rating on any day because it is physically impossible for a joint mine to tender on a given day more coal than it can produce and make ready for shipment on that day. The 100 per cent rule does not require a joint mine to split its tender of coal among the two or more roads serving it. It may tender its entire output to the particular railroad having the greatest available car supply on a given day, in which event it will receive the same pro rata distribution of cars as a local mine on the same road making the same tender. If it exercises its right to split its tenders, i. e., to tender part of its output to one road and part to another, it will receive the same pro rata distribution of cars as the local mines making similar tenders to those particular roads. The 100 per cent rule prevents joint mine operators from attempting to place orders for cars with bogus or counterfeit tenders, and is clearly within the statutory powers of the Commission to approve or to refuse to disturb upon complaint of such operators.

III. That, in paragraph three of the petition, after quoting from the December 11, 1922, decision of the Commission to the effect that

"the joint mine has available a more extensive and a more varied market for its coal," it is stated:

"The mine having established and built up these markets in times of car plenty, the Commission proceeds to take the advantage away in times of car shortage by the working of the rule as it itself sets [fol. 193] it out and puts such mine on a lower basis than the local mine on the road having the larger car supply in every case and down nearer to the level, if not actually below the level, of the average of the local mines on both railroads. The operation of Rule 4 in times of car shortage puts the joint mine in a position of disadvantage by reason of its location."

These interveners deny that the 100 per cent rule takes away in times of car shortage the advantage of a more extensive and more varied market for coal enjoyed by a joint mine. The 100 per cent rule does not deprive the joint-mine operator of his right, derived from the location of his mine on two or more roads, to tender the entire output of the mine to one of such roads or to split his tenders among the several roads in any manner he may choose. If he splits his tenders, the fact that his mine may secure a lesser number of cars than some local mine of the same rating or some joint mine of the same rating which does not split its tender is not the fault of the rule, but the logical result of his own voluntary act of choice in the matter. As the Commission said on page 439 of its report of December 11, 1922—

"Whenever the joint mine orders cars from the different carriers serving it, it is doubtless due to other compensating advantages which outweight those of a temporary greater car supply, and such election is the voluntary choice of the shipper."

These interveners also deny that the operation of the 100 per cent rule in times of car shortage puts the joint mine in a position of disadvantage by reason of its location. In Dering Mines Co. v. Director [fol. 194] General, 62 I. C. C. 265, and Ridge Coal Co. v. M. P. R. R. Co., 62 I. C. C. 259, the Commission made an exhaustive investigation of the advantages and disadvantages of local and joint mines under the 100 per cent rule, and found—

"that a joint or junction point mine has a decided advantage over a local mine in the matter of car supply as well as in other respects."

IV. That in respect to the following allegations of paragraph four of the petition—

"The operation of Rule 4 is prejudicial of the joint mine and preferential of the local mine. It must appear obvious from the quotation from the opinion regarding the operation of the rule that the joint mine located on railroads A and B received under Rule 4 less cars from each railroad, proportionately, than such railroad serves to its local mines. The Commission insists that the aggregate car supply received by the joint mine from both railroads must be taken

as a basis of comparison with the local mines' car supply, for purposes of consideration of Section 3 of the Interstate Commerce Act. Your petitioners deny that Section 3 of the Act authorizes the Commission to predicate an order of undue prejudice against a railroad by reason of the practices of another carrier."

these interveners deny that the 100 per cent rule is prejudicial to the joint mine and preferential to the local mine. On the contrary, it [fol. 195] compels the joint mine, as the local mine is compelled by other rules, to make a bona fide, concomitant tender of capacity to load the aggregate number of cars ordered on the day for which the cars are ordered. The joint mine on railroads A and B receives, not a lesser number of cars, but precisely the same number of cars as do the local mines on either road making similar tenders of coal for shipment.

By declining to hold that the 100 per cent rule is unlawful, the Commission does not insist that the aggregate car supply received by the joint mine from both railroads be taken as a basis of comparison with the local mines' car supply for purposes of consideration of Section 3 of the Act. The original complaints filed by the petitioners herein alleged, among other things, that the 100 per cent rule is unduly prejudicial to joint mines in violation of Section 3 of the Act. The burden of proof was upon complainants, petitioners herein, to sustain this allegation. In support thereof, complainants introduced certain exhibits comparing the aggregate number of cars received by joint mines with the aggregate number of cars received by local mines with like ratings on each of the roads serving the joint mines. Certain of these exhibits (Nos. 16, 17 and 18) showed that, during April, 1920, when the 100 per cent rule was in effect, the Parker Run joint mine of the titular complainant was entitled to receive 398 cars from the Baltimore & Ohio and Monongahela, while local mines with like ratings on the same roads were entitled to receive only 397 cars and 266 cars, respectively. Certain other of these exhibits (Nos. 12 and 13) showed that during August, 1920, when the 100 per cent rule was in effect, the joint mines of the New River Company were entitled to receive 3,058.9 cars from the Chesapeake & [fol. 196] Ohio and Virginian, while local mines with like ratings on both roads were entitled to receive an average of only 2,788 cars. By reversing its findings and conclusions in Fairmont & Cleveland Coal Co. v. B. & O. R. R. Co., 62 I. C. C., 269, the Commission in effect decided that the complainants, petitioners herein, had not sustained the burden of proof and that the foregoing comparisons did not indicate that the joint mines were unduly prejudiced by the operation of the 100 per cent rule. The Commission has not predicated an order of undue prejudice or any other order against any of the defendants by reason of the practices of another carrier. The only order which the Commission has entered in these cases is one dismissing the complaints and this order was entered because the complainants, petitioners herein, utterly failed to prove what they had charged in their complaints. The decision of the Supreme Court

of the United States in Central Railroad of New Jersey v. United States, cited by petitioners, has no application to such a situation.

V. That, in respect to the following statements contained in paragraph five of the petition—

"That the legal right of the joint mine is to receive its pro rata of the available cars of each railroad with the single limitation, in the public interest, that it shall not receive a greater number of cars in the aggregate than it has capacity to load. The decision of the Commission in the so-called Illinois case, 25 I. C. C. 286, was a limitation upon this right and not an extension of it. The rule laid down [fol. 197] in that case, and approved by the Commission in the first decision of the instant cases, 62 I. C. C. 269, was acquiesced in by petitioners but only as it represented a practical way of giving certainty to the basis of ordering cars which would give to the joint mine a close approximation of the car supply to which it is legally entitled. The case made by the opponents of your petitioners has throughout been based upon the erroneous conception that undue prejudice and preference can be arrived at in the orders for cars. The contention of your petitioners throughout these cases has been that preference or prejudice can only be determined upon the supply of cars. If a joint mine receives no more than its proportionate share of cars from each railroad the local mines on either one have no cause for complaint; if a mine, by reason of its location, receives additional cars from another railroad, to which the local mine under no car distribution rules could be entitled, such additional supply from the second railroad cannot cause a discrimination or prejudice of the local mine on the first road."

these interveners say that the maximum measure of the legal right of a joint mine is to receive its pro rata share of the available cars from each of the roads serving it, such pro rata shares being based upon the percentage which its bona fide, concomitant tender to each road bears to the total bona fide, concomitant tenders made to each such road. The decision in the so-called Illinois Cases, 25 I. C. C. 286, was an unwarranted extension of the foregoing rule as it permitted a joint mine with a daily rating of 100 cars to receive its pro rata share of the available cars based upon bona fide tenders aggregating 100 carloads of coal, and an additional share of the available cars based [fol. 198] upon artificial tenders of 50 carloads of coal. Under the 150 per cent rule prescribed in the Illinois Case, a joint mine with an aggregate daily rating of 100 cars was permitted to make a bona fide tender of 50 carloads of coal to Railroad A, a similar bona fide tender to Railroad B, and a bogus tender of 50 carloads to Railroad C; and Railroad C, in arriving at the pro rata shares of the respective mines, was required to give the same weight and consideration to this tender of 50 carloads by the joint mine as it gave to a bona fide tender of 50 carloads by a local mine. Such a rule or any rule permitting a joint mine to make bogus tenders of more coal than it can produce and make ready for shipment on a given day is based upon a fundamental misconception of the common carrier obligations of

railroads both at common law and under the Interstate Commerce Act.

With special reference to the statement that—

"The case made by the opponents of your petitioners has throughout been based upon the erroneous conception that undue prejudice and preference can be arrived at in the orders for cars."

these interveners again point out that the burden of proof was upon petitioners to prove that the 100 per cent rule was unduly prejudicial to joint mines and not upon the interveners to show that it was not unduly preferential to local mines. However, these interveners contend that a reasonable request for cars, i. e., an actual or constructive tender of sufficient coal ready for immediate shipment to load the number of cars ordered is a prerequisite to the duty of the carriers to furnish any cars whatsoever, or even to consider the order. The [fol. 199] legal tender must come first. If the order is based upon a bogus tender, if it is based upon false representations regarding the capacity of the joint mine to produce and make ready for immediate shipment, it is entitled to no more consideration than the request of a bystander who has no coal to ship.

VI. That, in respect to the following statement in paragraph six of the petition—

"The Commission is without power to predicate an order under the Act to Regulate Commerce in order to equalize the running time of mines. As pointed out in the dissenting opinion of Commissioner Potter:

'To do so would be to require discrimination in the use of equipment—not remove it. If a local mine is at a disadvantage it is not because of a transportation problem with which we may deal but because of a labor problem which is not for us.'

In so far as the decision of the Commission is predicated upon an advantage that the joint mine may have in a labor supply by reason of the greater running time afforded to it under the rule of the Illinois case, the decision is in excess of the statutory powers of the Commission."

these interveners say that the Commission has entered no order designed and intended to equalize the running time or labor supply of mines, and in the very next sentence in the petition—

[fol. 200] "Even in this regard, however, the Commission makes no specific finding that there is any advantage to the joint mine in labor supply," etc.

the petitioners themselves in effect concede that the Commission did not predicate its action in dismissing the original complaints upon any finding, conclusion or opinion that the running time and labor supply of joint mines and local mines should be equalized, nor upon any purpose, design or intent to bring about any such equalization.

The original complaints filed by petitioners were levelled at the

100 per cent rule and alleged, among other things, that the said rule is unjust, unreasonable and unduly prejudicial to joint mines and unduly preferential of local mines. In assuming the burden of proving these allegations, the complainant companies, petitioners herein, introduced numerous exhibits and computations based upon the relative car supplies of joint mines and local mines in the same district under the operation of the 100 per cent rule. In opposition to the exhibits and computations introduced by complainants, these interveners introduced two exhibits and computations also based upon the relative car supplies of joint mines and local mines in the same coal producing districts. One of these latter exhibits (No. 39) showed that during the period from March 1, 1920, to but not including January 1, 1921, a period when the 100 per cent rule was in full force and operation, the joint mines, including the joint mines of complainants in Docket Nos. 12,083 and 12,084, in the New River District of West Virginia received sufficient cars to keep them running the equivalent of 157.13 full working days, whereas the local mines, [fol. 201] including the mines of these interveners, received sufficient cars to keep them running the equivalent of only 123.78 full working days. In its first decision in these cases (Fairmont & Cleveland Coal Co. v. Baltimore & Ohio R. R. Co., 62 I. C. C. 269, 275) the Commission stated that this comparison—

"is subject to the criticism that it takes the aggregate mine ratings rather than the number of cars ordered,"

but in their petition for rehearing these interveners pointed out, as the record showed (page 84), that throughout the period in question the complainants in the New River District had ordered 100 per cent of their ratings from both the Chesapeake & Ohio and the Virginian and that the said roads reduced these orders 50 per cent, making the aggregate orders a total of 100 per cent of the ratings.

The other exhibit and computation introduced by these interveners (No. 38) showed that, during the same period, two joint mines in the Fairmont District served by the Baltimore & Ohio and Monongahela Railways, the district wherein is located and the roads serving, the joint mine of the complainant in Docket Nos. 12081 and 12082, received a 7.1 per cent better car supply than the average of the local mines and joint mines.

These interveners conceded then and concede now that the joint mines are entitled as a matter of right to advantages in car supply and running time such as are represented by the foregoing comparisons, which advantages result directly from their advantages of location on more than one railroad and which are fully recognized and protected [fol. 202] under and by virtue of the operation of the 100 per cent rule. These interveners did not and do not ask the Commission to deprive joint mines of such advantages of location, nor to deprive them of any other right or rights by equalizing the running time or labor supply of joint mines and local mines, or in any way whatsoever. And nothing in the order dismissing the complaints requires the defendant carriers to equalize the running time or labor supply of joint mines and local mines, or in any way whatsoever requires

the said defendants to deprive the complainant joint mines of anything.

These interveners point out that their references and contentions in brief and argument regarding the relative labor supply of joint mines and local mines were made in opposition to complainants' insistent demand for a measure of car supply above and beyond their right under Section 1 and in opposition to complainants' charge of undue prejudice under Section 3, and these interveners further point out that the Supreme Court of the United States has decided that whether a given situation is unduly prejudicial is a question of fact (Interstate Commerce Commission v. Alabama R. R. Co., 168 U. S. 144, 170), and that in passing upon such a question the Commission is empowered to consider and should consider—

All circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers (Texas & Pacific Ry. v. I. C. C., 126 U. S. 197, 219),

and these interveners say that the running time of mines directly affects the welfare of coal operators, their employees, their customers and the public.

[fol. 203] VII. That, in respect to the following statement in paragraph seven of the petition—

"That the Commission acted in these cases without sufficient evidence,"

these interveners again point out that the burden of presenting sufficient evidence to sustain the allegations of the complaints was upon the complainants, petitioners here, and as the said complainants failed to sustain the burden and to prove the allegations of the complaints, there was nothing left for the Commission to do but dismiss the complaints.

In any event, these interveners call attention to the following Rule 15 (c) of the Commission's Rules of Practice reading:

"If the application be * * * for reopening the proceeding to take further evidence, the nature and purpose of the evidence to be adduced must be briefly stated and it must appear not to be merely cumulative."

The petition "to reopen these proceedings to take further testimony" does not comply with the said Rule 15 (c) of the Rules of Practice, as it does not state the nature and purpose of the further evidence proposed to be adduced nor whether the further evidence would or would not be cumulative. In the following statement in the petition—

"The Commission in its first decision in these cases found Rule 4 to be unreasonable and prejudicial and also found what would be the [fol. 204] reasonable rule and prescribed the same. The rule it pre-

scribed was, in practical effect, the same as that that had been suggested in the Illinois case, supra, and it was promptly put in effect by the four defendants in these proceedings. The experience thus had under the rule laid down in those cases was not before the Commission in the instant proceeding. An indication of what that experience was is given in the general investigation of the Commission into the car distribution rules, Docket No. 13896 but not at all in a comprehensive way."

petitioners seem to indicate that some of the further evidence proposed to be introduced would relate to the "experience" had under the 150 per cent rule. In respect to this proposed evidence, interveners say that the 150 per cent rule is not in issue in these cases and consequently evidence of "experience" under the operation of that rule would be irrelevant and immaterial.

In the following statements of the petition—

"Exhibit No. 131 of the Chesapeake & Ohio in that proceeding shows that under the operation of the 75 per cent rule there was less inflation of ratings at joint mines than at local mines. The Commission will understand that the rating rule for joint mines was not in issue in the instant proceedings and no testimony in regard to such ratings was introduced. In fact it was expressly excluded by the Examiner. In the general Car Distribution inquiry it appears, by definite testimony, that the rule for rating joint mines gives to such mines no advantage over the local mines and, in fact, the same method of rating is employed. It is not disputed that the ratings of joint mines are not inflated to the extent as are the ratings of local mines, which, under Circular CS-31 Revised, are in position to [fol. 205] and do inflate ratings in times of car shortage to a much greater extent than the joint mines."

petitioners seem to indicate in one breath that part of the proposed evidence to be introduced would relate to mine ratings and the inflation thereof, and in the next breath to concede that the question of mine ratings and the inflation thereof is not in issue in these cases and that consequently evidence bearing thereon would be irrelevant and immaterial. These interveners agree that the question of mine ratings and the inflation thereof is not in issue and, as stated in the petition to reopen, testimony in regard to mine ratings "was expressly excluded by the Examiner." And these interveners show that the said testimony in regard to mine ratings was excluded by the Examiner upon the objection of counsel for complainants, petitioners herein, and the said counsel is one of the same counsel whose names appear as counsel on the petition to reopen. (See Record 102; petition to reopen.) And, furthermore, these interveners deny and dispute the statement that the ratings of joint mines are less inflated than the ratings of local mines, and that the said Exhibit No. 131 so proves, but on the contrary these interveners say that the ratings of joint mines are inflated as much or more than the ratings of local mines and that one reason why defendants do not correct and reduce the inflated ratings of joint mines to as great an extent as they contemporaneously correct and reduce the inflated ratings of

local mines is the fear of traffic reprisals by the joint mines and that this very condition of discriminatory flexibility and variation in the determination and correction of ratings is one of the questions before the Commission in Docket No. 13896, the said General Car Distribution Inquiry.

[fol. 206] These interveners contend that the Commission would not be justified in reopening these cases for the purpose of receiving evidence regarding matters which are clearly not in issue. In this connection, these interveners point out that in Complainant's Answer (page 9) to Interveners' Petition for Reconsideration, Reargument and Consolidation of these cases with Docket No. 12362, Bell & Zoller Coal Company v. Baltimore & Ohio R. R. Co., et al., the said complainants, petitioners, here insisted—

"that all of the questions in issue in these proceedings were fully considered by the Commission,"

and in Complainants' Answer (paragraph 3) to Interveners' Motion for Temporary Order filed in Docket No. 13896, In Re Rules and Regulations Governing Distribution of Coal Cars, the said complainants, petitioners here, contended that the instant proceedings—"are submitted by the Commission after full hearing."

VIII. That interveners, having fully answered each and every allegation and ground of complainant's petition to reopen, present this further reason why the said petition should be denied:

On June 17, 1922, the Commission on its own motion entered upon a general investigation of the reasonableness and propriety of all rules and regulations governing the rating of coal mines and [fol. 207] the distribution of coal cars, including the 100 per cent rule in issue herein, Docket No. 13896, in Re Rules and Regulations Governing Distribution of Coal Cars, etc. Petitioners here are parties to that proceeding and counsel for petitioners took an active part in that proceeding.

On November 16, 1922, during the hearing in the said Docket No. 13896, interveners in the instant cases filed a Motion for Temporary Order asking the Commission to require the carriers defendant in the instant cases to cancel the so-called 150 per cent rule which they had been given authority temporarily to observe by the first decision herein, and to restore and apply the 100 per cent rule until the further order of the Commission. The Commission took the said motion under advisement and, on December 11, 1922, handed down a second decision in the instant cases and, by reversing the first decision, in effect approved the 100 per cent rule and withdrew its previous grant of authority to defendants to deviate therefrom. On page 443 of its second report, however, the Commission stated:

"The present decision is of course without prejudice to such determination of the questions before us in the general proceeding indicated as involving the mine rating and car-distribution rules as the record may there require."

It is thus seen that the issues in the instant cases are still before the Commission in Docket No. 13896, and also that the second decision of the Commission in the instant cases is without prejudice to the determination of the issues involved in the said Docket No. 13896. These interveners therefore contend that any further representations, contentions or arguments which petitioners desire to [fol. 208] present to the Commission in respect to the 100 per cent rule or any other rule involved in the said Docket No. 13896 should be made and submitted in that proceeding.

Wherefore, interveners pray the Commission to deny the petition to reopen the instant proceedings and to refer petitioners to Docket No. 13896, In Re Rules and Regulations Governing Distribution of Coal Cars, etc., as the proper proceeding in which to make further representations, arguments and contentions in respect to Rule 4 of CS-31, Revised.

Dated at Washington, D. C., January 26, 1923.

Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, Turkey Knob Coal Company, Coal Run Coal Company, Branch Coal Company, Beechwood Coal & Coke Company, Greenwod Coal Company, Laurel Creek Coal Company, Quinnimont Coal Company, Maryland Coal & Coke Company, Star Coal & Coke Company, Ephriam Creek Coal & Coke Company, Stover Coal Company, Interveners, By George T. Bell, Their Attorney. George T. Bell, Woodward Building, Washington, D. C.

[fol. 209] EXHIBIT "E" TO AMENDED ANSWER

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket Nos. 12081-12084

The West Virginia Joint Mine Cases

ABEND COAL COMPANY, BENTON, BIG MUDDY COAL COMPANY, Breese-Trenton Mining Company, Carterville & Big Muddy Coal Company, Chicago-Springfield Coal Company, Columbia Collieries Company, Egyptian Coal & Mining Company, Fallon Coal Mines Company, General Coal & Mining Company, Gillespie Coal Company, Kolb Coal Company, Liberty Coal & Mining Company, Lou-Nash Coal & Mining Company, Midway Coal Mining Company, Moffat Coal Company, Mount Olive and Staunton Coal Company, Nashville Mining Company, New Prosperity Coal Company, O. K. Coal Company, Paradise Coal Company, Penwell Coal Mining Company, Perry County Coal Corporation, Rowan Mining Company, St. Louis Coal Company, Security Coal & Mining Company, Spoon River Colliery Company, Star Coal & Mining Company, Superior Mining Company, Wasson Coal Company, By George T. Bell, Their Attorney

Petition and Answer of Security Coal & Mining Company and Other Illinois Local Operators to Complainant's Petition to Re-open

[fol. 210] Now come the Security Coal & Mining Company, Paradise Coal Company, Penwell Coal Mining Company and other Illinois local-mine operators, hereinafter referred to as Illinois interveners, and by this their petition and answer to complainants' petition to reopen, respectfully show:

I. That the said Illinois interveners were interveners of record in Docket No. 12362, Bell & Zoller Coal Co. et al. v. B. & O. S. W. R. R. Co., et al., which case was consolidated, argued and submitted with the so-called West Virginia Joint Mine Cases, the complainants in which cases are now seeking to reopen the proceedings for further hearing. The said Illinois interveners respectfully aver that all these [fol. 211] joint mine cases involve fundamental questions of law and great principles of equality of opportunity and that necessarily whatever conclusion is finally reached by the Commission for application in West Virginia must apply as well in Illinois and other states of the United States. And the said Illinois interveners further show that at the first oral argument in the West Virginia Joint Mine Cases, Fairmont & Cleveland Coal Co. v. B. & O. R. R. Co., counsel for the complainant joint mine operators therein stated (record 422) in answer to a question by the presiding Commissioner:

"I believe fully that whatever rule the Commission adopts should be the rule adopted in all territory. I do not think we have any

special rights in the New River District or in the Fairmont District."

Upon the foregoing facts and circumstances, the said Illinois interveners aver that they have a direct and vital interest in the so-called West Virginia Joint Mine Cases and in complainants' petition to reopen the said cases and in whatever disposition the Commission may make of the said petition, and they therefore respectfully but earnestly request the Commission to consider this their answer to the said petition to reopen.

II. That the said Illinois interveners hereby adopt as their own the answer of the Slab Fork Coal Company and other West Virginia local mine operators to complainants' petition to reopen in so far as it is applicable and as it refers to the fundamental questions of [fol. 212] law and the great principles of equality of opportunity involved and further answering the said petition the said Illinois interveners say:

III. That, in respect to the following statement in paragraph one of the petition:

"Your petitioners by reason of their foresight and investment, have so located their properties as to receive of right, the service of two or more carriers,"

these interveners shows that the mine of the complainant in Docket Nos. 12081 and 12082 was located and opened with a connection to only one railroad, to wit, the Baltimore & Ohio Railroad and that the Monongahela Railway was not then in existence but later built a line contiguous to the said complainant's property; and that the mines of the original complainants in Docket Nos. 12083 and 12084 were located and opened on what were formerly the Piney River & Paint Creek Railroad and White Oak Railway which railways, according to their reports (p. 5) to this Commission for the five months ended November 30, 1912, were built by proprietary coal companies—

"for the purpose of developing their property and to reach their mines and deliver coal to the Chesapeake & Ohio Railway"—

and that only by subsequent trackage arrangements which have been the subject of numerous bitter complaints to the Commission were [fol. 213] the said mines given a joint status. (Record, 124-127, 148; Allowances to Kanawha, Glen Jean & Eastern, 41 I. C. C., 53; Record, 17-18; Exhibit 1.)

And the said Illinois interveners further show that the record in Docket No. 12362, Bell & Zoller Coal Co. v. B. & O. S. W. R. R. Co. shows that numerous joint mines in Illinois secured a joint status without the exercise of any so-called "foresight" and without the investment of a single dollar by their owners, and in its decision therein the Commission among other things — *ing*—

"Certain joint mines in Illinois and Indiana have expended large sums to secure connections with more than one road. This is not true as to all of the joint mines. The evidence seems to establish the fact that it was the desire of the carriers to secure coal traffic, particularly in the southern Illinois coal field, which led to arrangements being made by them for ingress to large mines, either by building into such mines or by means of trackage agreements or switching-absorption arrangements."

IV. That, in respect to the statement in paragraph three of the petition following the quotation from the December 11, 1922, decision of the Commission to the effect that the "joint mine has available a more extensive and a more varied market for its coal" and reading—

"The mine having established and built up these markets in times of car plenty, the Commission proceeds to take the advantage [fol. 214] away in times of car shortage by the working of the rule as it itself sets it out and puts such mine on a lower basis than the local mine on the road having the larger car supply in every case and down nearer to the level, if not actually below the level, of the average of the local mines on both railroads. The operation of Rule 4 in times of car shortage puts the joint mine in a position of disadvantage by reason of its location"—

these interveners deny that the 100 per cent rule takes away in times of car shortage the great advantage of a more extensive and a more varied market for coal enjoyed by a joint mine. In support of this denial, these interveners refer to the crashingly significant fact that since the initial promulgation of the 100 per cent rule in Illinois, no less than seven complaints have been filed with this Commission by Illinois local operators to compel the railroads to treat their local mines as joint mines in order to secure the very advantages which complainants in the instant cases say are negatived by the 100 per cent rule. And certain of the said Illinois local operators also owned and operated joint mines and knew by experience of the great advantages enjoyed by joint mines and realized and appreciated that said advantages were fully recognized and protected by the 100 per cent rule.

Ridge Coal Mining Co. v. M. P. R. R. Co., 62 I. C. C. 259.
Dering Mines Co. v. Director General, 62 I. C. C. 265.
Hillsboro Coal Co. v. C. C. C. & St. L. Ry. Co., 63 I. C. C. 401.
Benton Coal Mining Co. v. C. B. & Q. R. R. Co., 63 I. C. C. 396.

[fol. 215]

Franklin County Mining Co. v. C. B. & Q. R. R. Co., 63 I. C. C. 396.
Cameron Coal Co. v. M. & E. R. R. Co., 63 I. C. C. 434.
Gallatin Coal & Coke Co. v. L. & N. R. R. Co., 55 I. C. C. 491.

The said Illinois interveners further show that in the Ridge Coal Mining Company Case, the Commission found that—

"Joint mines are treated by the carriers, in the matter of car supply and other transportation services, the same as mines physically located on more than one railroad. Thus in times of car shortage a joint mine may draw cars from each of the railroads to which the mine is joint, whereas a local mine is limited in its supply to the one line serving it. * * *

The record establishes that a joint or junction point mine has a decided advantage over a local mine in the matter of a car supply as well as in other respects."

and in the Dering Mines Company Case that—

"The advantages which would accrue to the complainants if they should prevail would be a better car supply in times of car shortage, due to the opportunity they would then have to draw cars from both lines; an additional route to Chicago and other points reached by both lines; and access by each mine to local markets on both lines instead of only the local markets on its one line as at present * * *. The benefit chiefly sought by complainants, however, is better car supply to the joint mine in times of car shortage. The record shows that the joint mine has an advantage in this respect."

[fol. 216] And these interveners further point out that the record in Docket 12362, Bell & Zoller Coal Co. v. B. & O. S. W. R. R. Co., shows that since the promulgation of the 100 per cent rule joint mine operators, acquainted by experience with the operation of the said rule, have paid two and three times as much for coal lands adjacent to more than one railroad as for coal mines adjacent to a single railroad in order to secure the very advantages which complainants in the instant cases say are negatived by the 100 per cent rule, and further that the said Illinois joint mine operators are willing to and do, expend thousands of dollars in money, cheap railroad-fuel contracts, and in other ways to secure a third and even a fourth railroad connection, although such third and fourth connections would not entitle them (because additional railroad connections do not increase the productive capacity of mines) to place orders for more cars than a local mine of the same rating under the 100 per cent rule, or even to place orders for more cars than a two line joint mine of the same rating under the 150 per cent rule. (Record, 147-148.)

V. That, in respect to the following statement in paragraph 6 of the petition—

"The Commission is without power to predicate an order under the Act to Regulate Commerce in order to equalize the running time of mines. * * * In so far as the decision of the Commission is predicated upon an advantage that the joint mine may have in a labor supply by reason of the greater running time afforded to it under the rule of the Illinois case, the decision is in excess of the [fol. 217] statutory powers of the Commission."

the said Illinois interveners say that the Commission has entered no order designed or intended to equalize the running time or labor supply of mines.

In Docket No. 12362, Bell & Zoller Coal Co. v. B. & O. S. W. R. R. Co., the said Illinois interveners introduced an exhibit (No. 15 corrected) compiled from the annual report of the Illinois Department of Mines for the year ended June 30, 1920, which showed the following among other information:

	Served by one carrier	Served by two or more carriers
Number of Commercial Shipping Mines ...	232	118
Average tons shipper per mine	144,800	257,232
Average number of days worked per mine ..	165.5	185.6

The period covered by the foregoing table was a period during which the 100 per cent rule was in full force and operation. The Illinois interveners conceded in the said case, and they conceded now, that the joint mines in Illinois were and are entitled as a matter of right to advantages in car supply and running time such as are represented by the foregoing comparison, which advantages resulted, now result and will always result from advantages of location on more than one railroad and which are fully recognized and protected by the 100 per cent rule. These Illinois interveners have never requested and do not now request the Commission to deprive joint [fol. 218] mines of such advantages of location or to deprive the said mines of any other right or rights by equalizing the running time or labor supply of joint mines and local mines or in any way whatsoever.

VI. That, in respect to the statement in paragraph seven of the petition—

"That the Commission acted in these cases without sufficient evidence,"

these Illinois interveners join with the West Virginia interveners in pointing out that the burden of presenting sufficient evidence to sustain the allegations of the complaints was upon the complainants and, as the said complainants utterly failed to prove the allegations of the complaints, the Commission properly dismissed the complaints.

In respect to the suggestion that, if the proceedings are reopened, complainants will introduce evidence relating to "experience" under the 150 per cent rule, these Illinois interveners say with the West Virginia interveners that the 150 per cent rule is not in issue in the instant cases, nor was it in issue in the Illinois Joint Mine Cases, and consequently evidence of "experience" under that rule would be irrelevant and immaterial. In this connection reference is made to the following testimony of Mr. Battey, Coal Traffic Manager of the Burlington in Docket No. 12362:

"If we were serving a joint mine with a rating of 100 cars, for example, under the 150 per cent rule they would be entitled to order 150 cars. If the Chicago, Burlington & Quincy and the other roads serving this mine had on any given day an 80 per cent car supply, that would mean that this mine would receive 80 per cent of 150 [fol. 219] cars, or 120 cars, whereas their rating or their capacity is only 100 cars. The proposed rule says that a mine shall not be furnished in excess of its rating or capacity. But it would not be practicable, as we see it, for the interested lines serving a joint mine to exchange information as to their status for that day, and the number of cars they could furnish each mine on a given day. They could not exchange that information in time to prevent the overfilling of orders at those joint mines. Therefore, you would have in that case twenty cars more set in at this mine that they could load, and they would either have to be pulled and taken to some other mine, possibly in time for loading that day, or they would remain at the mine and not be used until the following day"—

and to the following testimony of Mr. Porterfield, General Superintendent of the Illinois Central in the same Docket:

"Under the old 150 per cent rule as published on our railroad, there was a serious waste of cars, because there was no limit to it. The Fairmont rule has a limit, but I do not quite see how we are going to supervise it—or that is, get sufficiently close to it to prevent wasting some cars, because it is impossible for the several railroads in the mining field scattered probably over 100 miles, to get into communication with each other and find out what a mine ordered and what the railroads had furnished. In fact, after we make out estimate of cars that we are able to furnish, frequently something happens—an engine fails, or some delay occurs, that cuts the supply down below what we expected to furnish."

In respect to the suggestion that, if a rehearing is granted in the instant cases, complainants will show that there is less inflation of [fol. 220] ratings at joint mines than at local mines, these Illinois interveners join with the West Virginia interveners in contending that the queston of ratings, their determination, inflation, policing and correction is not in issue in these cases or any of them and that therefore evidence bearing thereon would be irrelevant and immaterial. And these Illinois interveners deny and dispute the statement on page 8 of the petition to the effect that the rating of joint mines are less inflated than the ratings of local mines, but on the contrary these interveners say that the ratings of joint mines are as a rule more inflated than the ratings of local mines, because the carriers, due to fear of traffic reprisals by the joint mines, are generally more lax in determining, policing and correcting the ratings of joint mines than in determining, policing and correcting the ratings of local mines which are compelled to ship all their coal via the single railroad serving them. In support of this denial, these Illinois interveners refer the Commission to the record in Docket No. 12362 where it appears that, in response to persistent complaints to the Car

Service Section of the American Railway Association, the said Section made an investigation of the ratings of all local and joint mines on the St. Louis Division of the Illinois Central Railroad in the autumn of 1920 and developed "extraordinary and gross irregularities, a general lack of integrity and almost a complete absence of policing on the part of the carriers," with the result that the ratings of the said joint mines were reduced an average of 18 per cent, while the ratings of the said local mines were reduced an average of only 3.8 per cent. (Record 504-508; Exhibit 16.)

[fol. 221] Wherefore, the Illinois local operators, having by incorporating the answer of the West Virginia local operators herein and directly, answered each and every material allegation of complainants' petition to reopen, pray the Commission to dismiss the said petition.

Dated at Washington, January 27, 1923.

Abend Coal Company, Benton, Big Muddy Coal Company, Breese-Trenton Mining Company, Carterville & Big Muddy Coal Company, Chicago-Springfield Coal Company, Columbia Collieries Company, Egyptian Coal & Mining Company, Fallon Coal Mines Company, General Coal & Mining Company, Gillespie Coal Company, Kolb Coal Company, Liberty Coal & Mining Company, Lou-Nash Coal & Mining Company, Midway Coal Mining Company, Moffat Coal Company, Mount Olive and Staunton Coal Company, Nashville Mining Company, New Prosperity Coal Company, O. K. Coal Company, Paradise Coal Company, Penwell Coal Mining Company, Perry County Coal Corporation, Rowan Mining Company, St. Louis Coal Company, Security Coal & Mining Company, Spoon River Colliery Company, Star Coal & Mining Company, Superior Mining Company, Wasson Coal Company, By George T. Bell, Their Attorney.

[fol. 222] At a District Court of the United States for the Southern District of West Virginia, continued and held at Charleston, in said District, on Friday, the 10th day of August, A. D., 1923, the following order was made and entered of record:

[Title omitted]

FINAL ORDER AND DECREE

This cause came on to be heard on the 30th day of March, 1923, on the prayers and applications of the complainants for a temporary injunction and for a permanent injunction and on the merits of the amended bill and on the supplemental bill and the answers thereto, answers having been filed by all of the parties defendant other than the United States of America and the Interstate Commerce Commission, and the United States of America and Inter-

state Commerce Commission having stated in open court that they respectively relied upon their motions to dismiss and desire to submit the case without answer or further pleading on behalf of the United States of America and Interstate Commerce Commission and due notice having been given of said hearing on said application for injunctions and on the merits, and said cause having on the evidence submitted been fully heard by three judges, to wit: Hon. C. A. Woods and Hon. Edmund Waddill, Jr., Circuit Judges, and Hon. Geo. W. McClintic, District Judge of the District Court of the United States for the Southern District of West Virginia, duly convened for said hearing and having been argued by all parties by their attorneys.

And it appearing (1) that during the period of Federal control of railroads there had been put into effect by the Director General of Railroads a rule of car distribution, known as Rule 4 of Circular C. S.-31 Revised, applying to coal mines engaged in the shipment [fol. 223] of coal in interstate commerce and served by two or more carriers; (2) that by and pursuant to recommendations of the Interstate Commerce Commission of March 2, 1920 and April 15, 1920, said rule had been kept in force and effect by said carriers until June 21, 1921; (3) that on said date the Interstate Commerce Commission, in a proceeding entitled Fairmont & Cleveland Coal Company, et al., vs. Baltimore & Ohio R. R. Co., et al., 66 I. C. C. 269, in which the complainants herein were petitioners and the carriers defendants herein were parties, found and ruled that said Rule 4 of Circular C. S.-31 Revised was unreasonably and unduly prejudicial to mines served in interstate commerce by two or more carriers and that the defendant carriers should for the future distribute cars according to a rule laid down in said decision of June 21, 1921, of the Commission as the proper and just rule, (to wit: a rule which had been promulgated by the Commission in In Re Irregularities in Mine Ratings, 25 I. C. C. 286) and in said decision of June 21, 1921, directed as follows:

"We shall expect that defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies thereof with us;"

(4) that the defendant carriers, pursuant to said finding, decision and direction so amended their rules and put into effect in place of said Rule 4 the rule then directed to be put into effect, known as the Illinois Rule;

And it further appearing (5) that subsequently the Interstate Commerce Commission, by its own order, without application of the complainants or carriers defendants herein, and the Illinois Rule being still in effect in accordance with the ruling of the Commission in the Fairmont case, directed the Fairmont case to be reopened and consolidated with the case known as the Bell & Zoller case; (6) that on December 11, 1922, the Commission in said consolidated cases rendered a decision and report in which, in reversal of its previous finding and ruling, it found and ruled:

"The present facts considered, we do not conclude upon these records that the rule attacked, Rule 4 of Circular C. S.-31 Revised, [fol. 224] is in principle unreasonable or unduly prejudicial,"

and that

"Our former conclusions in the Fairmont case, based upon a mistaken adherence to and extension of the decision in the Illinois case, are reversed."

and thereupon entered an order incorporating as a part thereof its decision and report, said order being as follows:

"These cases being at issue upon complaints, answers, and intervening petitions on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions therein, which said report is hereby referred to and made a part hereof;

It is ordered, That the complaints in these proceedings be, and they are hereby, dismissed."

and that by said order so incorporating the findings and conclusions of the Commission, Rule 4 of Circular C. S.-31 Revised was again put into effect and made operative and was authorized as the rule of car distribution to be followed by the carriers in lieu of the Illinois Rule, and that under and pursuant to said order of December 11, 1922, the carriers herein then published Rule 4 effective as of February 1 on defendant, Virginian Railway, and as of February 10, 1923, on defendant, Chesapeake & Ohio Railway, in substitution for the Illinois Rule previously put into effect by direction of the Commission.

And it further appearing (7) that the complainants are the owners of mines reached and served by each of the defendant carriers in the transportation of coal in interstate commerce; (8) that the defendant carriers are independent and competing carriers; (9) that said order of the Commission of December 11, 1922, by which said Rule 4 was so again put into effect and authorized was beyond its statutory power and the power which it could constitutionally exercise, and is without warrant of law; that by said order and said Rule 4 promulgated and authorized thereby, the complainants are unlawfully deprived and denied lawful rights of transportation, and without due process of law are deprived of and denied property rights and liberty of contract; that no rule similarly affecting transportation rights has been put into effect by the [fol. 225] Commission on *to* any other commodity and that the fact that the commodity to be transported is coal has no bearing on the transportation rights involved; also that the complainants would be irreparably damaged if said order of the Commission and said Rule 4 are allowed to operate or remain in effect.

It is ordered, adjudged and decreed as follows:

1. That the order of December 11, 1922, of the Interstate Commerce Commission, whereby Rule 4 of Circular C. S.-31 Revised is promulgated and put into effect and authorized is without warrant in law and is null and void.

2. That said order and said Rule 4 of Circular C. S.-31 Revised promulgated and authorized thereby are hereby set aside and annulled.

3. That the United States of America, the Interstate Commerce Commission and the carriers defendant herein, and each of them, are perpetually restrained and enjoined from restricting, in accordance with said order of December 11, 1922 of the Interstate Commerce Commission, and of Rule 4 of Circular C. S.-31; Revised thereby promulgated and put into effect and authorized, the transportation rights in interstate commerce of the complainants and from so restricting said service by or through any other order or rule to the same effect.

Enter above final order and decree as of the 10th day of August, 1923.

Edmund Waddill, Jr., U. S. Circuit Judge. Geo. W. McClintic, Dist. Judge.

[fol. 226] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

Before Woods and Waddill, Circuit Judges, and McClintic, District Judge

OPINION OF THE COURT—Filed Aug. 10, 1923

McCLINTIC, District Judge:

This is a suit in equity, brought under the provisions of the Urgent Deficiency Appropriation Act, approved October 22, 1913, found in 38 Statutes, L. 219.

This case arises under that part of the act which abolished the Commerce Court, and gave jurisdiction, under certain circumstances, to the District Courts.

When an application is made for an injunction, temporary or permanent, under this act, and the District Judge decides that it is a proper case to hear, it becomes his duty to call to his assistance to hear and determine the application, two other judges, one of whom must be a Circuit Judge.

The bill in this cause was presented to the District Judge of the Southern District of West Virginia, on the 29th day of January, 1923, and an order was made, filing the bill of complaint, and set-

ting for hearing the application for the temporary restraining order and interlocutory injunction therein prayed for, at the court room of the United States District Court, at Richmond, Virginia, on Tuesday, February 6, 1923; and further ordered that a copy of the bill be served upon each defendant in said cause.

[fol. 227] This case came on for hearing before the Honorable Charles A. Woods and the Honorable Edmund Waddill, Jr., Circuit Judges, and the Honorable George W. McClintic, District Judge, at Richmond, on the said 6th day of February, 1923.

The defendant, the United States of America, and the defendant, the Interstate Commerce Commission, appeared by counsel, and moved the court to dismiss the bill for want of jurisdiction, and want of equity, for reasons set out in separate written motions, duly filed.

The defendants, the Chesapeake & Ohio Railway Company, and the Virginian Railway Company, each appeared by counsel, and filed answers to the bill in this cause.

The Slab Fork Coal Company, and numerous other companies, as intervening defendants, appeared and by leave of court, filed their intervening petition and motion to dismiss, and later, filed their answer to the bill of complaint herein.

This cause came on to be heard on the said 6th day of February, 1923, upon the bill and exhibits, upon the motions above set out, and the answers filed, and upon the evidence taken in open court, and a temporary restraining order was entered on the 8th day of February, 1923, staying and suspending the operation of a certain decision, ruling and order of the Interstate Commerce Commission, made on the 11th day of December, 1922, and of Rule 4, of Circular C. S.—31 (revised), for the period of sixty days from said date, pending the application for an injunction.

Later, the bill was amended by leave of court, and the answers of the intervening defendants were also amended by leave of court.

On the 30th day of March, 1923, this cause came on for final hearing before the same judges, and was submitted for decision, and an order was entered continuing the temporary stay and suspension until the final decision upon the application.

The bill in this cause was filed by the New River Company and [fol. 228] six subsidiary companies, named as plaintiffs. All the stock of the six subsidiary companies is owned by the New River Company, and such companies operate mines situated in Fayette and Raleigh counties of West Virginia, and in the Southern District thereof. Under the designation of the Interstate Commerce Commission, mines in this region are divided into two classes, to-wit: "Joint Mines" and "Local Mines."

By the designation "Joint Mines," is meant those mines situated on, and entitled to service from, two or more carriers. By the designation "Local Mines," there is meant, those on, or accessible to, one carrier. In this opinion, they will be so designated for the purpose of convenience.

In this region, there are many mines other than those of the plaintiffs, which are joint mines, and there are many mines which are local mines. The intervening petitioners all own local mines.

The railway companies in this particular case which serve these mines, are the Chesapeake & Ohio Railway and the Virginian Railway.

The question which comes up for decision in this case is, whether a joint mine shall be allowed to order such cars as it may need, according to its rated capacity as fixed under the rule, from each railroad, or shall it be allowed only to order such number of cars from both carriers as it would be allowed to order from one carrier.

The history of this question appears from the record in this case to be as follows:

For a period of years prior to the taking of Federal control of railroads, cars were distributed in time of car shortage, to joint mines in the New River fields, by each of the carriers, by what will, for convenience, be referred to as the New River rule; that is, there was no distinction between joint mines and local mines, and cars were distributed to joint mines, according to their proportionate share of the [fol. 229] available car supply in that region, as determined by the rated capacity of the shipper, and without reference to, or inquiry into, the car supply furnished by any other railway. The only limitation placed on the mine was, that these orders for cars based on its rating, should not result in a car supply greater than the capacity of the mines to ship. If, in practice, the orders were so placed as to exceed the capacity of the mine to ship, the penalty rule was provided, in order to limit the car supply for its succeeding days, and ultimately, to be reflected in the rated capacity of the mine for the succeeding months.

This rule here described, has sometimes been called "the two hundred per cent rule."

By the decision of the Interstate Commerce Commission in the Illinois case (In re: Irregularities in Mine Ratings, 25 I. C. C. 286), the commission required that the carrier shall furnish daily to the operators, a statement of the available car supply for the following day. Under the car service rules appended to the bill in this record, the mines place their orders at 4 P. M. on each day, for the following day. Where there are two carriers, this rule, known as the Illinois rule, permits the joint mine to order from each carrier, such number of cars as it may need, based on its rated capacity, not to exceed 75 per cent of such rated capacity. This is sometimes called the "one hundred and fifty per cent rule."

When under the law the government took charge of the railroads, the director general of railroads provided for the distribution of cars for mines in accordance with Circular C. S. 31, Rule 4, hereinafter referred to as Rule 4. In effect, this rule was, and is, that a joint mine could only order from the carriers one hundred per cent of its rated capacity, and stood in no better position than a local mine; indeed, it was not in so good a position as a local mine, unless it ordered all of its cars from the carrier having the greatest supply of cars on that particular day.

This Rule 4 continued to be the measure of car distribution so [fol. 230] long as Federal control of railroads continued, and thereafter, until the decision of the Interstate Commerce Commission on

the 21st day of June, 1921, in the case of Fairmont & Cleveland Coal Company vs. Baltimore & Ohio Railroad Company (62 I. C. C. 629). It was decided by the commission that Rule 4 of Circular C. S.—31 Revised, was unreasonable and unduly prejudicial to joint mines, and unduly preferential to local mines, to the extent that it limited the aggregate orders of the joint commission to one hundred per cent of its rated capacity from both roads, and that for the future, during periods of car shortage, the carrier should distribute cars to the joint mines on their lines, considered in that case, on the basis outlined in the Illinois rule, namely, on days when the joint mine orders cars from only one carrier, and on days on which it orders cars from both carriers, its rating on each of such carriers shall be seventy-five per cent of its full rating, subject to the limitation that it shall on no day be supplied with cars in excess of its maximum rating; and that information should be exchanged between carriers, showing the left-over cars, in order to pervent any abuses that might come therefrom. .

This rule then continued in force until a decision was entered by the Interstate Commerce Commission on the 11th day of December, 1922, in the case of Bell & Zoller Coal Company, et al., vs. Baltimore & Ohio Southwestern Railroad Company, et al., wherein an order was entered and an opinion filed, reversing the opinion in the Fairmont case, supra, and again putting into effect Rule 4 of Circular C. S.-31, revised.

Following this decision, the carriers, the Chesapeake & Ohio Railway Company, and the Virginian Railway Company, arranged to put into effect said Rule 4, the one on the first day of February, 1923, and the other on the 10th day of February, 1923.

This suit was instituted to enjoin such acts on the part of the carriers, and action was taken therein as above set forth, relative to the [fol. 231] temporary restraining order.

The question is raised whether this court has any jurisdiction. It is claimed that it has none, on the ground that the decision of the Interstate Commerce Commission is negative, and no appeal can be taken therefrom, under the ruling of the Supreme Court in the case of Proctor & Gamble Company vs. United States 225; U. S. 286.

This question is raised by the motions to dismiss, filed by the United States and Interstate Commerce Commission, and by intervening defendants.

Without going into a full discussion thereof, we are of opinion that the decision of the Interstate Commerce Commission was in substance and effect affirmative, and that the carriers so understood it, and acted upon it, as an affirmative order, and in consequence thereof, took affirmative action; and the results, so far as the rights claimed by the plaintiffs were concerned, was the same as if the order had been affirmative in form. It is a case in which we must deal with the substance and not the form.

We are therefore of opinion that the Proctor & Gamble case, and other cases of like nature, do not apply here, and that this court has jurisdiction to pass upon the questions raised by the pleadings.

The facts developed by the evidence show very large expenditures

made by the plaintiffs, for the purpose of shipping coal by the two carriers. It is also shown, that the shortage of cars on each carrier continues most of the time, and that the right to ship coal by each carrier, is a valuable property right. If the right to ship by each carrier, and to receive cars from each carrier, on the basis of rated capacity, is denied to the plaintiffs, and to other shippers in like condition, the financial loss will be very great, and the value of their properties will be greatly depreciated. Much larger prices have been paid for mines which had access to the lines of two carriers, than would be thought of, for similar mines, with access only to the line of [fol. 232] one carrier. When there is any real market for coal, car shortage has always existed, and so far as can be foreseen, will always exist. This case would not have arisen, if each carrier had always on hand a sufficient supply of cars, to take care of the demands of each shipper.

The shipper of any commodity who has access to more than one carrier, has a right to choose one carrier, or to divide his goods among two or more carriers, with the advantages naturally belonging to such location, giving such access; and while the Interstate Commerce Commission has, under the law, certain powers of regulation, yet, it is beyond such powers to deprive the shipper of such right, under the guise of regulation, or to limit such right in such way as to amount to the deprivation thereof.

From the adjudged cases, it is plainly to be seen, that the Interstate Commerce Commission has no authority to so exercise its powers so arbitrarily as virtually to transcend such authority conferred, although it may be not technically doing so.

Proctor & Gamble Co. vs. United States supra.

A so-called regulation which destroys at least thirty per cent of the market value of a coal property, certainly transcends such authority. It is a taking of private property without due process of law, by depriving the owner of the power to use it in a legitimate and proper way, for the commercial purpose for which it was designed and developed, by the large extra expenditures of money as shown by the evidence in this cause.

Of course a commercial advantage will accrue to the joint mine, over the local mine, by the abrogation of Rule 4, but in our opinion, that advantage constitutionally belongs to it, by reason of its location, and one that the Interstate Commerce Commission cannot order the carriers to take away from it, and one of which the carrier cannot legally deprive it.

A question analogous to this, was before a three Judge Court in Pennsylvania recently, in the case of the Pennsylvania Railroad Company vs. United States, and the court therein decided, that the [fol. 233] order of the Interstate Commerce Commission was erroneous, and the same was enjoined and suspended.

Davis, Circuit Judge, in the opinion of the Court, in deciding that the industries, situated in a certain zone, where they had access to two carriers, were entitled to such advantage over those out of the zone, and on the line of one carrier, said:

It has been repeatedly held that where one company serves a community or industry located on the tracks of another under a trackage arrangement, the situation in effect is the same as if the former company had extended its own tracks to such community or industry. Commercial Club of Superior, Wis. vs. Great Northern Railway, 24 I. C. C. 96; Penick & Ford v. Director General, 61 I. C. C. 173; Louisville & Nashville Railroad vs. United States, et al., 242 U. S. 60. The industries, therefore, located along the tracks of either company in the zone are in law to be considered as on the individual tracks of both companies, and the industries beyond this zone as located on the tracks of one of the companies only. Consequently, in legal effect, these industries which are within the zone and those without the zone are not similarly situated, but are in a substantially different position. And so the advantage enjoyed by the industries within the zone over those without the zone is not, within the meaning of the Act, an undue or unreasonable preference. Ridge Coal Mining Co. v. Missouri Pacific R. R. Co. 62 I. C. C. 259; Dering Mines Co. et al., vs. Director General, 62 I. C. C. 265; Louisville & Nashville Railroad Company, et al., vs. United States, et al., supra. [fol. 234] "A carrier must use its existing facilities impartially," and the railroads, under the facts in this case, are under no obligation to extend or curtail their facilities. The legal position of the industries in the zone is just the same as though they were located at some other part of the city away from the tracks. An industry selecting a disadvantageous location for reasons justifiable to itself has no right to call upon the carriers to over come such disadvantage at their expense and this is what the industries outside of the zone, so far as the legal situation is concerned, did."

We mean only to hold that Circular C. S.-31, Rule 4 (Revised), and the action of the carriers in putting it in force, is erroneous, and must be enjoined and suspended.

The order will be entered without prejudice to the Interstate Commerce Commission making proper orders relative to reasonable car distribution, to joint as well as local mines, not in conflict with the views hereinbefore expressed.

(Endorsed:) I concur. Edmund Waddill, Jr., U. S. Circuit Judge.

[File endorsement omitted.]

[fol. 235] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

DISSENTING OPINION—Filed Aug. 10, 1923

WOODS, Circuit Judge, dissenting:

The rule for distribution of cars to coal mines other than anthracite mines, in time of shortage, established while the railroads were under Government control, was as follows:

"Copies of orders for cars for a mine that is joint with any other carrier (steam, electric or water) shall be filed with the designated representative of each such carrier, such combinations of orders must not exceed the gross daily rating of the mine."

Joint mines are those served by two or more carriers. Local mines are those served by only one carrier. The rule meant that in car distribution joint mines were to be rated on the same basis as local mines: that is, they were to have no advantage by reason of the double service. After release of the railroads from Federal control the Interstate Commerce Commission recommended that carriers continue the rule in force "until such time as the experience of the carrier or the Commission should dictate other and more appropriate rules for the rating and distribution of cars to coal mines."

On January 11, 1921, the complainants in this case filed com-[fol. 236] plaints before the Interstate Commerce Commission against the Chesapeake and Ohio Railway Company and the Virginian Railway Company alleging the rule hereinbefore quoted, now known as Rule 4 of Circular CS-31, to be unduly preferential to complainants' competitors, the local mines. These cases before the Interstate Commerce Commission, known as Nos. 12083 and 12084, were consolidated with Nos. 12081 and 12082, similar in character. After hearing, the Commission found Rule 4 to be unjustly and unreasonably favorable to local mines; and further found that the joint mines should have a rating in car distribution in the proportion of 150 per cent for the joint mines to 100 per cent for the local mines. That is, the joint mines might have 75 per cent on each carrier as against 100 per cent to the local mines on one carrier. At the conclusion of the opinion the Commission said:

"We have not required that car service rules be filed as tariff schedules. We will not in this proceeding direct that the rules which we herein find to be reasonable be so filed. We shall expect, however, that defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies thereof with us."

No order was made by the Commission. Similar complaints, by coal operators in Indiana and Illinois, had been filed before the Commission, known as Bell & Zoller Coal Company et al., v. Baltimore &

Ohio Southwestern Railroad Company et al., Nos. 12362 and 12399. While these last complaints were pending a petition was filed before the Interstate Commerce Commission by the owners of local mines concerned to reopen the former holding of the Commission in Nos. 12083 and 12084, that the 150 per cent rule in favor of joint mines was just and reasonable. The cases were consolidated. After full hearing of evidence and argument, the Commission reversed its [fol. 237] former conclusions and found that Rule 4—the equality rule without regard to whether a mine was served by one road or more—was just and reasonable. The complaints of the owners of all the joint mines, including those of the complainants in this suit, were dismissed by the following order:

"These cases being at issue upon complaints, answers and intervening petitions on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the complaints in these proceedings be, and they are hereby, dismissed."

There was never any order, or even final determination of the Commission to put into effect any rule or to interfer- with Rule 4 of the railroads. The conclusions announced in its opinion were reopened, reconsidered and changed; but all this was done in one consolidated proceeding, which was never ended until the Commission made the order above quoted. This last order was a final dismissal of the complaints and a refusal to take any action with respect to Rule 4 of the railroads. It was, therefore, a negative order—a mere refusal to interfere with an existing rule. As such it was not reviewable by this court. Proctor & Gamble v. United States, 225 U. S., 282. The action of the Interstate Commerce Commission in the case cited had more the semblance of affirmative action than in this, for there Proctor & Gamble asked the revocation or modification of a rule expressly approved by the Commission, while here, in a continuous proceeding, the Commission merely reached the ultimate conclusion that it would not interfere with an existing rule of the railroads. I, therefore, think the Court had no jurisdiction [fol. 238] whatever to enjoin the railroads from operating under Rule 4 as a rule established by affirmative action of the Interstate Commerce Commission.

Even, however, if Rule 4 had been adopted and put into effect by the Interstate Commerce Commission, it seems to me perfectly clear that this Court has no power to change it. It is apparent from the above statement that the Interstate Commerce Commission has devoted much time and care to the consideration of the justness and reasonableness of the rule. To say the least, it cannot be doubted that the whole matter is debatable and that there are very strong reasons in favor of Rule 4 as distinguished from the 150 per cent rule claimed by the complainants. Even if this Court entertains

the opinion that the action of the Commission was unwise and improper, that affords no ground to say that a prima facie case for an injunction has been made out. Interstate Commerce Commission v. Illinois Cent. R. R., 215 U. S. 452, 478, 30 Sup. Ct. 155, 54 L. Ed. 280; Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; Manufacturers' Ry. Co. v. United States, 246 U. S. 457; Skinner & Eddy Corporation v. United States, 249 U. S. 557, 562; Seaboard Air Line Ry. Co. v. United States, 254 U. S. 57, 62; Akron, Canton & Youngstown Ry. Co. v. United States, — U. S., — (decided February 19, 1923). The authority of this court is "confined to determining whether there had been violations of the Constitution, or of the power conferred by statute, or an exercise of power so arbitrary as virtually to transcend the authority conferred. Interstate Commerce Commission v. Illinois Central R. Co., 215 U. S. 452, 470; Interstate Commerce Commission v. Union Pacific R. Co., 222 U. S. 541, 547; Proctor & Gamble v. United States, 225 U. S. 282, 297; Interstate Commerce Commission v. Baltimore & Ohio R. Co., 225 U. S. 326, 340." Kansas City So. Ry. v. United States, 231 U. S. 439, 440.

There is no ground for the argument that the refusal of the Interstate Commerce Commission to set aside Rule 4 is an invasion of [fol. 239] any constitutional right of the plaintiffs. Akron, Canton & Youngstown Ry. Co. v. United States, — U. S., —, (decided Feb. 19, 1923). The Court has no power under the statute to regulate interstate commerce; it can only interfere with the action of the Interstate Commerce Commission when the Commission has taken affirmative action contrary to the Constitution or the statute, or has taken such arbitrary action as to virtually transcend its authority. To grant the injunction on this debatable question seems to me to be setting up the judgment of the Court upon a question of fact against the findings of the Interstate Commerce Commission, and that is beyond the power of the Court.

[File endorsement omitted.]

[fol. 240] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ABSTRACT OF TESTIMONY TAKEN BEFORE JUDGES WOODS, WADDILL AND MCCLINTIC—Filed Oct. 6, 1923

At United States Circuit Court Room,
Richmond, Virginia, February 7, 1923.

SAMUEL A. SCOTT, being first duly sworn testified that he is the Vice-President of the New River Company and General Manager of its subsidiary companies; that the greater portion of the produc-

tion of the mines of the subsidiary companies is from shaft mines; that these shaft mines are located so as to have connection with both the Chesapeake & Ohio and Virginian Railways; that at the time of acquiring these mines the New River Company considered it necessary to receive transportation from more than one outlet, as shaft mines are expensive to open and operate; that the investment of the New River Company in Raleigh and Fayette Counties is over $10,000,000; that shaft mines are more expensive than drift or slope mines; that at the time the New River Company properties were opened the mines generally in operation were drift mines; that since my connection with the company expenditures of over $2,000,000 have been made on the properties in electrifying the mines, building new steel tipples, building new houses, purchasing new locomotives and new mining machines, building a new warehouse and office building, increasing the sales force, and opening offices in New York for the purpose of increasing the production of the mines; that in the making of these expenditures the amount of transportation and transportation facilities was a material element; and the witness would not have reccommended these expenditures if it had not been for the joint service of the two railroads; that [fol. 241] $450,000 has been spent in the purchase of new properties adjacent to the mines with joint service and that these expenditures would not have been justificable if the mines had not had the service of more than one road; that the access of the mines to the two railroads has broadened the market for coal in times of full car supply; that the cutting down of the car supply demoralizes the labor organizations of the mines; that the labor organization of a mine is built up a great expense and it is a serious matter to lose men.

That if Rule 4 is put into effect the heavy investments in the joint mines could not be utilized to their full extent; that part of the miners would leave and part of the houses would be left vacant; that there would not be sufficient tonnage to supply existing contracts and the companies would be exposed to claims and damage suits; that the business of the company would be damaged; that its good will would suffer; that the selling organization would be demoralized; that the cost of mining coal would be increased from 40 to 50 cents a ton.

Cross-examination:

There are about 40 joint mines in the New River District which are not shaft mines; some of the expenditures were made for all of the properties, including the local mines of the companies. Under the rules and the practice that prevails in the New River District, orders for cars by both joint mines and local mines must be placed on the day before the cars are desired for loading and these orders are complied with by the carriers during the night or early morning by placing the cars at the mines. If the joint mines had the right to order more than 100 per cent of their ratings the joint mines would be able to retain their employees but the oppo-

site would be true as to all local mines, the demoralization of the labor organizations at the local mines would be necessarily greater. If the 150 per cent rule continues there will be no change in the present labor situation or between the joint mines and the local mines.

[fol. 242] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ABSTRACT OF TESTIMONY TAKEN BEFORE JUDGES WOOD, WADDILL, AND MCCLINTIC

At United States Circuit Court Room,
Richmond, Virginia, March 30, 1923.

SAMUEL A. SCOTT, being first duly sworn testified that he is Vice-President of the New River Company and General Manager of its subsidiary companies, and has active charge of the management of the subsidiary companies; that he has acted in this capacity since January 1911; that in 1911 the New River Company owned the capital stick of the White Oak Railway and Piney River & Paint Creek Railroad; that in 1912 these railways were jointly leased by the Chesapeake & Ohio Railway and the Virginian Railway; that in 1917 the White Oak Railway was purchased by the Virginian Railway and that part of the Piney River & Paint Creek Railroad was purchased by the Chesapeake & Ohio Rialway and part by the Virginian Railway; that the investment of the New River Company in the railroad properties referred to as of the date of the sale in 1917 was $845,981.00; that the money consideration received by the New River Company from the Chesapeake & Ohio and Virginian Railways aggregated $727,000.00 or an apparent loss of $118,981.00; that there had been a further loss of $143,745 sustained in operating the properties; that at the time of the sale of the two roads to the Chesapeake & Ohio and Virginian Railways the New River Company was interested in having connections with two trunk lines in order that it might have a full car supply to operate its mines and it was also interested in extending the markets for its coal to the operators served by both trunk lines; that in the sale of the two roads to the Chesapeake & Ohio and Virginian Railways [fol. 243] there was a trackage agreement made between the two trunk lines whereby each line had the right and undertook to serve all the mines covered by the contract for a period of 99 years; that the mines of complainants are equipped to produce and market coal to the extent of their productive capacity; that at the present time there is a shortage of cars on both the Chesapeake & Ohio and Virginian Railways; that the mines of complainants desire to mine and ship coal in the cars of both the Chesapeake & Ohio and Virginian Railways; and that complainants are prepared to furnish all the coal which either or both the defendant carriers can take.

Cross-examination:

Complainants operate 11 joint mines in the New River District. There is a total of about 50 joint mines in that district.

WALTER L. BOOTH, being duly sworn testified that he is Superintendent of Transportation of the Chesapeake & Ohio Railway Company with headquarters at Richmond, Virginia; that he has held this position since 1918; that when he assumed this position Rule 4 of Circular CS-31 Revised was not in effect; that the Chesapeake & Ohio Railway had rules governing the distribution of cars in effect at that time; that these rules did not provide for a differentiation in the distribution of coal cars as between joint mines and local mines; that the Chesapeake & Ohio Railway distributed cars to the joint mines without reference to the car supply furnished to such mines by the Virginian Railway; that when he assumed his present position the Chesapeake & Ohio Railway was under Federal control and Rule 4 of Circular CS-31 Revised was promulgated by him as an official of the United States Railroad Administration; that the distribution of cars under the rule in effect prior and subsequent to Circular CS-31 Revised, was in accordance with the ratings of the mines; that at the end of Federal control the rules of Circular CS-31 were continued in effect on the Chesapeake & Ohio Railway; that subsequently Rule 4 of Circular CS-31 was changed by the Chesapeake & Ohio Railway pursuant to the decision of the Commission [fol. 244] in the Fairmont & Cleveland Coal Company Case with the result that the so-called 150 per cent rule was put into effect; that the 150 per cent rule was continued until February, 1923, when the 100 per cent rule was published to take it out, as I recall it, on account of the Bell & Zoller decision of the Interstate Commerce Commission, but it was nevertheless continued by reason of the restraining order in this proceeding, and is still in force; that prior to the application of Circular CS-31 Revised the ratings of mines on the Chesapeake & Ohio Railway were made without regard to the Virginian ratings of joint mines; that the office of the Superintendent of Transportation is custodian of orders of the Interstate Commerce Commission with respect to the distribution of cars addressed to the Chesapeake & Ohio Railway; that he has been served with a subpœna duces tecum to search his files for any such orders of the Interstate Commerce Commission which limit in any respect the car service to be given to joint shippers of commodities other than coal and that he has not been able to find any such orders.

Cross-examination:

That prior to the promulgation of Circular CS-31 the Chesapeake & Ohio Railway distributed cars to mines regardless of the distribution of the Virginian Railway; that he is not familiar with the manner in which the Virginian Railway obtained its ratings of mines prior to the promulgation of Circular CS-31; that the Virginian, in determining the rating of joint mines, did not take into consideration the shipments made by such mines via the Chesapeake & Ohio

Railway; that the Chesapeake & Ohio Railway rated joint mines the same as local mines.

That he receives copies of the orders of the Interstate Commerce Commission regarding car service which it is his duty to put into effect; that these copies generally come from the General Manager of the company; that usually these orders of the Interstate Commerce Commission are served upon the agents of the railroads in Washington. The witness here identified a copy of Circular CS-10 of March 22, 1920, which contains a rule providing for the distribution of grain cars similar in import as the 100 per cent rules in Cir-
[fol. 245] cular CS-31 regarding coal cars; this rule was not promulgated by the Interstate Commerce Commission but by the American Railway Association, an association of the railways of the country, and whose powers are largely recommendatory; the rule contained in the circular was identical with the one promulgated by the United States Railroad Administration in Circular CS-74 which has been continued in effect on the recommendation of the Interstate Commerce Commission.

[File endorsement omitted.]

[fol. 246] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

PETITION FOR APPEAL BY INTERVENING DEFENDANTS—Filed Oct. 6, 1923

Slab Fork Coal Company, a Corporation; Scotia Coal & Coke Company, a Corporation; South Side Company, a Corporation; Turkey Knob Coal Company, a Corporation; Coal Run Coal Company, a Corporation; Branch Coal Company, a Corporation; Beechwood Coal and Coke Company, a Corporation; Greenwood Coal Company, a Corporation; Laurel Creek Coal Company, a Corporation; Quinnimont Coal Company, a Corporation; Maryland-New River Coal Company, a Corporation; Star Coal & Coke Company, a Corporation; Ephriam Creek Coal & Coke Company, a Corporation; Stover Coal Company, a Coporation.

The above-named intervening defendants, feeling themselves aggrieved by the final order or decree of the District Court and entered August 10, 1923, pray an appeal to the Supreme Court of the United States therefrom.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

Intervening defendants pray that a transcript of the record, proceedings, and papers on which the final order or decree was made

and entered, duly authenicated. may be transmitted forthwith to the Supreme Court of the United States.

Geo. T. Bell, Solicitor for Above-named Intervening Defendants.

[File endorsement omitted.]

[fol. 247] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ASSIGNMENT OF ERRORS BY AND ON BEHALF OF INTERVENING DEFENDANTS, SLAB FORK COAL COMPANY ET AL.—Filed Oct. 6, 1923

The intervening defendants, to-wit: Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, Turkey Knob Coal Company, Coal Run Company, Branch Coal Company, Beechwood Coal and Coke Company, Greenwood Coal Company, Laurel Creek Coal Company, Quinnimont Coal Company, Maryland-New River Coal Company, Star Coal & Coke Company, Ephriam Creek Coal & Coke Company, and Stover Coal Company, now come by their counsel, and in connection with their petition for appeal, file the following assignment of errors on which they will rely in their appeal to the Supreme Court of the United States from the final order or decree of the District Court entered August 10, 1923.

I. That the said District Court erred in denying the motion of the United States to dismiss the bill of complaint and in not sustaining the motion.

II. That the said District Court erred in denying the motion of the Interstate Commerce Commission to dismiss the bill of complaint and in not sustaining the motion.

III. That the said District Court erred in denying the motion of the foregoing intervening defendants to dismiss the bill of complaint and in not sustaining the motion.

[fol. 248] IV. That the said District Court erred in ordering, adjudging and decreeing that the order of December 11, 1922, of the Interstate Commerce Commission, be set aside and annulled.

V. That the said District Court erred in ordering, adjudging and decreeing that Rule 4 of Circular CS-31 Revised, be set aside and annulled.

VI. That the said District Court erred in ordering, adjudging and decreeing that the order of December 11, 1922, of the Interstate Commerce Commission is without warrant in law and is null and void.

VII. That the said District Court erred in perpetually restraining and enjoining the Interstate Commerce Commission, the United States of America, and the defendant railroad companies, from

"restricting, in accordance with said order of December 11, 1922, of the Interstate Commerce Commission, and of Rule 4 of Circular CS-31 Revised, thereby promulgated and put into effect and authorized, the transportation rights in interstate commerce of the complainants and their so restricting said service by or through any other order or rule to the same effect."

VIII. The said District Court erred in reaching the conclusion that the order of December 11, 1922, of the Interstate Commerce Commission was in substance and effect an affirmative order.

IX. That the said District Court erred in reaching the conclusion that it had jurisdiction of the subject matter of this suit.

[fol. 249] X. That the said District Court erred in holding that the order of the Interstate Commerce Commission resulted in the taking of Private property without due process of law.

XI. That the said District Court erred in reaching the conclusion that the Interstate Commerce Commission required the defendant carriers to put into effect Rule 4 of Circular CS-31 Revised.

XII. That the said District Court erred in holding that the Interstate Commerce Commission was without power to require the defendant carriers to put in force and effect Rule 4 of Circular CS-31 Revised.

XIII. That the said District Court erred in substituting its judgment for the judgment of the Interstate Commerce Commission concerning a regulation pertaining to the distribution of cars for the transportation of coal in interstate commerce.

XIV. That the said District Court erred in making or entering a final order or decree in which are recited and stated (a) prior proceedings before the United States Railroad Administration during the period of Federal control, (b) prior proceedings before the Interstate Commerce Commission, and (c) a special finding of facts, in violation of Equity Rule No. 71.

XV. That the said District Court erred in finding that under Rule 4 of Circular CS-31 Revised, a joint mine stands in no better position than a local mine.

XVI. That the said District Court erred in finding that, under the so-called Illinois rule, when a joint mine orders cars from only one carrier, its rating on such carriers is 75 per cent. of its full rating.

[fol. 250] XVII. That the Distict Court erred in making the following findings:

"The facts developed by the evidence show very large expenditures made by the plaintiffs, for the purpose of shipping coal by the two carriers. It is also shown, that the shortage of cars on each carrier

continues most of the time, and that the right to ship coal by each carrier, is a valuable property right. If the right to ship by each carrier, and to receive cars from each carrier, on the basis of rated capacity, is denied to the plaintiffs, and to other shippers in like condition, the financial loss will be very great, and the value of their properties will be greatly depreciated. Much larger prices have been paid for mines which had excess to the lines of two carriers than would be thought of, for similar mines, with access only to the line of one carrier. When there is any real market for coal, car shortage has always existed, and so far as can be foreseen, will always exist. This case would not have arisen, if each carrier had always on hand a sufficient supply of cars, to take care of the demands of each shipper.

The shipper of any commodity who has access to more than one carrier, has a right to choose one carrier, or to divide his goods among two or more carriers, with the advantages naturally belonging to such location, giving such access; and while the Interstate Commerce Commission has, under the law, certain powers of regulation, yet, it is beyond such powers to deprive the shipper of such right, under the guise of regulation, or to limit such right in such way as to amount to the deprivation thereof.

From the adjudged cases, it is plainly to be seen, that the Interstate Commerce Commission has no authority to so exercise its powers [fol. 251] so arbitrarily as virtually to transcend such authority conferred, although it may be not technically doing so.

A so-called regulation which destroys at least thirty percent of the market value of a coal property, certainly transcends such authority. It is a taking of private property without due process of law, by depriving the owner of the power to use it in a legitimate and proper way, for the commercial purpose for which it was designed and developed, by the large extra expenditures of money as shown by the evidence in this cause.

Of course a commercial advantage will accrue to the joint mine, over the local mine, by the abrogation of Rule 4, but in our opinion, that advantage constitutionally belongs to it, by reason of its location, and one that the Interstate Commerce Commission cannot order the carriers to take away from it, and one of which the carrier cannot legally deprive it."

XVIII. That the District Court erred in reaching the conclusion that Rule 4 of Circular CS-31 Revised in effect deprives a joint mine of the right to order and receive cars from one or both of the carriers serving it according to its rated capacity, or deprives a joint mine of its right to tender the amount of coal represented by its gross daily rating to one or both of the carriers serving it. It is insisted that no joint mine has a right to transportation or to receive cars for transportation unless it makes an actual or constructive tender of sufficient coal to load the number of cars ordered and, as the daily rating of a joint mine presents its maximum capacity to tender coal for shipment, it also represents its maximum capacity to make reasonable requests for cars.

XIX. That the said District Court erred in not holding that the question whether Rule 4 of Circular CS-31 Revised was and is a valid

rule, or was and is unjust, unreasonable and unduly prejudicial was [fol. 252] and is one within the administrative functions of the Interstate Commerce Commission and that the said District Court had and has no jurisdiction to determine said question or to grant relief in respect thereto.

XX. That the District Court erred in not holding that the right of a joint mine to order cars and receive transportation is under paragraph 4, of Section 1 of the Interstate Commerce Act, conditioned upon a reasonable request being made therefor, and that the question whether aggregate orders of a joint mine for more cars than the number represented by 100 per cent of its gross daily rating are unreasonable requests for transportation is one within the administrative functions of the Interstate Commerce Commission and not subject to review by the District Court.

XXI. That the District Court erred in not holding that, as a matter of law, the aggregate requests of a joint mine for more than 100 per cent of its gross daily rating of cars are unreasonable to the extent that they exceed 100 per cent of the gross daily rating of the mine in that the requests for the excess cars are unaccompanied by actual or constructual tenders of coal ready for shipment.

XXII. That the District Court erred in not holding that the gross daily rating of a joint mine represents its maximum daily capacity to produce coal, its maximum daily capacity to tender coal for shipment, and therefore the maximum daily measure of its right to order cars whether such orders are addressed to one or both of the carriers serving it.

XXIII. That the said District Court erred in not holding that the question whether the aggregate daily rating of a joint mine to order cars from one or both of the carriers serving it shall be measured by its gross daily rating or capacity to produce and tender coal for ship- [fol. 253] ment is a just and reasonable or unjust and unreasonable rating, is one within the administrative functions of the Interstate Commerce Commission and not subject to review by the District Court.

XXIV. That the said District Court erred in not holding that a rule which limits the daily orders for cars of a joint mine to 100 per cent of its gross daily rating on both the carriers serving it is required by paragraph 12 of Section 1 of the Interstate Commerce Act.

Wherefore, intervening defendants pray that the final order or decree of the District Court may be reversed, annulled, and set aside with directions that the permanent injunction shall be dissolved and the bill of complaint dismissed, and for such other and further relief as may be deemed meet and just.

George T. Bell, Solicitor for Intervening Defendants

[File endorsement omitted.]

[fol. 254] At a District Court of the United States for the Southern District of West Virginia

[Title omitted]

Order Allowing Appeal of Slab Fork Company et al., Intervening Defendants

In the above-entitled cause, the Slab Fork Coal Company, et al., intervening defendants, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings and papers on which said order or decree was made and entered to the Supreme Court of the United States.

Geo. W. McClintic, United States District Judge.

[fol. 255] Citation on Appeal—Omitted in printing

Service of the foregoining citation and the receipt of a copy [fol. 256] thereof is hereby acknowledged this 6th day of October, 1923.

James W. Carmalt, Solicitors for All Appellees.

[fol. 257] In the District Court of the United States for the Southern District of West Virginia

Notice of the Appeal of the Slab Fork Coal Company et al., Intervening Defendants—Filed Oct. 6, 1923

[Title omitted]

To United States of America, Interstate Commerce Commission, the Chesapeake & Ohio Railway Company, and the Virginian Railway Company, Defendants:

You are hereby notified that the Slab Fork Coal Company, et al., intervening defendants in the above-entitled cause will prosecute an appeal from the final order or decree of the District Court, entered August 10, 1923, in the above-entitled cause, in which you are the defendants, to the Supreme Court of the United States, to reverse the decree rendered in the said cause.

Geo. T. Bell, Solicitor for the Slab Fork Coal Company et al., Intervening Defendants.

Service of a true copy of the foregoing notice is hereby acknowledged this 5th day of October, A. D. 1923.

——— ———, Solicitor for the Chesapeake & Ohio Railway Company. ——— ———, Solicitor for the Virginian Railway Company. Blackburn Esterline, Assistant to the Solicitor [fol. 258] General. J. Carter Fort, Solicitor for Interstate Commerce Commission.

Service of a true copy of the foregoing notice was made on W. S. Bronson, Solicitor for the Chesapeake & Ohio Railway Company, Richmond, Virginia, and W. H. T. Loyall, Solicitor for the Virginian Railway Company, Norfolk, Virginia, by depositing the same in the United States mail, addressed as aforesaid with postage prepaid at 4 P. M. on October 4, 1923.

Geo. T. Bell, Solicitor for Intervening Defendants.

[File endorsement omitted.]

[fol. 259] In the District Court of the United States for the Southern District of West Virginia

[Title omitted]

Notice of Appeal—Filed Oct. 6, 1923

To the Honorable E. D. Englend, Attorney General of the State of West Virginia:

You are hereby notified that the Slab Fork Coal Company, et al., intervening defendants in the above-entitled cause, have taken an appeal from the final decree of the District Court to the Supreme Court of the United States and that the order allowing the appeal makes the same returnable within thirty (30) days from the date of the order.

This notice is given you pursuant to Urgent Deficiencies Act, October 22, 1913, (38 Stat. 221).

Geo. T. Bell, Solicitor for Intervening Defendants.

October 4, 1923.

I hereby acknowledge receipt of a copy of the above notice this 5th day of October, A. D. 1923.

E. T. England, Attorney General of the State of West Virginia, By R. Dennis Steed, Assistant.

[File endorsement omitted.]

[fols. 260 & 261] BOND ON APPEAL FOR $1,000—Filed and Approved Oct. 15, 1923

[fol. 262] AT A DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ORDER ALLOWING APPEAL OF SLAB FORK COAL COMPANY ET AL., INTERVENING DEFENDANTS

In the above-entitled cause, the Slab Fork Coal Company, et al., intervening defendants, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings and papers on which said order or decree was made and entered to the Supreme Court of the United States.

The petitioners shall not have the benefit of this order until they, or some one for them, shall enter into the proper appeal bond in the penalty of one thousand dollars before the clerk of this court, with surety to be approved by the court, or one of the judges thereof, payable and conditioned as the law directs.

Edmund Waddill, Jr., United States Circuit Judge. Geo. W. McClintic, United States District Judge. Octo. 17, 1923.

[fol. 263] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

STIPULATION FOR TRANSCRIPT OF RECORD—Filed Oct. 18, 1923

It is hereby agreed and stipulated that the record in the above-entitled cause on appeal to the Supreme Court may be limited to the following matter:

1. Bill of complaint as amended and supplemental bill.
2. Intervening petition of Slab Fork Coal Company, et al.
3. Motion of the United States to dismiss.
4. Motion of the Interstate Commerce Commission to dismiss.

5. Motion of the Intervening Defendants to dismiss, with exhibit thereto attached.

6. Interlocutory order.

7. Dissenting opinion of Circuit Judge Woods.

8. Answer of Intervening Defendants, Slab Fork Coal Company, et al., as amended, with exhibits thereto attached.

9. Order filing intervening petition, motion to dismiss and answer of Slab Fork Coal Company, et al.

10. Answer of the Chesapeake & Ohio Railway Company.

11. Answer of the Virginian Railway Company.

12. Abstract of the testimony of Samuel A. Scott and Walter L. Booth hereto attached.

13. Order continuing temporary restraining order.

14. Opinion of the Court by District Judge McClintic.

[fol. 264] 15. Final decree entered August 10, 1923.

16. Petition for appeal filed by Slab Fork Coal Company, et al.

17. Order allowing appeal of Slab Fork Coal Company, et al.

18. Citation of appeal by Slab Fork Coal Company, et al.

19. Notice of appeal of Slab Fork Coal Company, et al. to defendants.

20. Notice of appeal of Slab Fork Coal Company, et al. to Attorney General of West Virginia.

21. Appeal bond filed by Slab Fork Coal Company, et al.

22. This stipulation.

James W. Carmalt, Solicitor for Complainants New River Company et al. George T. Bell, Solicitor for Slab Fork Coal Company et al.

[File endorsement omitted.]

[fol. 265] UNITED STATES OF AMERICA,
Southern District of West Virginia, ss:

CLERK'S CERTIFICATE

I, Ira H. Mottesheard, Clerk of the District Court of the United States for the Southern District of West Virginia, do hereby certify that the foregoing is a true and complete transcript of the record and proceedings, in accordance with the stipulation of counsel, in

the case of The New River Company, a corporation, et al., vs. The Chesapeake & Ohio Railway Company, a corporation, et al., and now of record and on file in my office.

In Testimony Whereof I hereto set my hand and the seal of said Court, at Charleston, in said District, this 30th day of October, A. D., 1923, and in the 148th year of the Independence of the United States of America.

Ira H. Mottesheard, Clerk D. C. U. S., S. D. W. Va. (Seal of District Court United States, Southern District West Virginia.)

Endorsed on cover: File No. 29,938. S. West Virginia D. C. U. S. Term No. 628. Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, et al., appellants, vs. New River Company, White Oak Fuel Company, Stuart Colliery Company, et al. Filed November 6th, 1923. File No. 29,938.

MAR 29 1894
WM. L. STRINGER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 635.

v.

No. 636.

SLAB FORK COAL COMPANY ET AL., APPELLANTS,

v.

THE NEW RIVER COMPANY ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

BRIEF FOR APPELLANTS IN No. 636.

GEORGE T. BELL,
Solicitor for said Appellants.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 627.

UNITED STATES OF AMERICA ET AL., APPELLANTS,

v.

THE NEW RIVER COMPANY ET AL., APPELLEES.

No. 628.

SLAB FORK COAL COMPANY ET AL., APPELLANTS,

v.

THE NEW RIVER COMPANY ET AL., APPELLEES.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

BRIEF FOR APPELLANTS IN No. 628.

Statement.

These cases come here upon appeals from an order and decree of the United States District Court for the Southern District of West Virginia, enjoining the Chesapeake & Ohio

Railway Company and the Virginian Railway Company from observing and applying a certain rule of coal-car distribution, and enjoining the United States of America and the Interstate Commerce Commission from attempting to enforce an alleged affirmative order of the Commission said to require the railway companies to establish, maintain and apply the rule of car distribution complained of. The order was granted on a bill filed by the New River Company and certain subsidiary companies, appellees here, operating eleven coal mines in the New River District of West Virginia served by the two railway companies named. These mines are what are known as joint mines, so called because they are served by more than one railroad.

There are frequent periods when the supply of cars available for coal loading is insufficient to meet the requirements or orders of the mine operators and consequently it long ago became necessary for carriers to maintain and apply rules for rating the shipping capacities of mines and for dividing and distributing the available cars among them. Prior to the World War there was no uniformity in these rules on the various railroads (25–26, 34*). When the railroads were taken under Federal Control during the war, the Director General prepared and promulgated a set of uniform rules, and later a revised set of uniform rules, for rating coal mines (other than anthracite) and for distributing cars to such mines during periods of car shortage (7, 34). While these rules were promulgated during Federal control, they were not adopted solely as a war measure (28).

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*The figures in parentheses are references to the pages of the printed record in No. 328.

So far as the two railways named were concerned, the uniform rules changed their former practices in two respects, pertinent here:

First: The Virginian and Chesapeake & Ohio formerly rated mines in different ways but in accordance with the shipments made by the various mines over their respective lines during some previous period. That is to say, a mine on the Virginian was given a rating based on its previous shipments via the Virginian; a mine on the Chesapeake & Ohio, a rating based on its previous shipments via the Chesapeake & Ohio. A joint mine on both roads was treated like a local mine on each road, and accordingly had two ratings (25-26, 135-136). Under the new uniform rules, which are still in effect in this respect, the rating of each and every mine is based on the total shipments made by it during the preceding month via the one or more carriers serving it. Specifically, the rating of a mine is determined by dividing the total tonnage shipped by it during the preceding month via the one or more carriers serving it by the number of hours worked in producing that tonnage and multiplying the quotient by the number of hours in the recognized work day (eight in the New River District). The result is termed the "daily rating" of a local mine, and the "GROSS daily rating" of a joint mine (18, 35–36).

Second: The Virginian and Chesapeake & Ohio formerly distributed cars to the mines in accordance with ratings determined as first above described. A joint mine served by both roads was given cars by the Virginian in accordance with its Virginian rating; by the Chesapeake & Ohio, in accordance with its Chesapeake & Ohio rating. No account

was taken by either road of the cars ordered from or furnished by the other road (25, 50-51, 135). Under the new rules, which are still in effect in this respect, a joint mine may be given cars by either road in accordance with its GROSS daily rating on both roads (21-22).

The new rules also contained provisions reading in part as follows:

> "Whenever the available car supply is such that all orders for cars cannot be filled, each mine shall be given its pro rata share of cars in accordance with the following rules:
>
> 1. The daily rating, or the daily order for cars if less than the rating, shall be the basis for car distribution.
>
> * * * * * * *
>
> 4. Each mine operator shall report to the local car distributor at 4 p. m. daily;
>
> * * * * * * *
>
> (*e*) Number of cars loaded during the day.
>
> (*f*) Number of empty cars standing over at close of day.
>
> * * * * * * *
>
> (*h*) Number of partly loaded cars under tipple at close of day.
>
> (*i*) Number of unconsigned loads on hand at close of day.
>
> (*j*) Additional number of empty cars required for loading following day.
>
> *Copies of orders for cars for a mine that is joint with any other carrier (steam, electric, or water), shall be filed with a designated representative of each*

such carrier. Such combinations must not exceed the gross daily rating of the mine.

* * * * * * *

7. The *pro rata* share of cars to which each mine is entitled * * * shall be based on its rating, or order when less than its rating." * * * (21-22).

Under the italicized provision, which is part of Rule 4, a joint mine is not permitted to order more than 100 per cent of its gross daily rating from both roads. That is to say, if a joint mine with a gross daily rating or shipping capacity of 100 cars orders 60 cars from one road, it is not permitted to order more than 40 cars from the second road on the same day. The joint mine may order its entire gross rating of cars from one road, or may split its order in any manner it may choose provided the total cars ordered does not exceed its gross daily rating.

After the termination of Federal Control (February 29, 1920), the railroads continued to maintain and apply the uniform rules, including the part of Rule 4 quoted above, which will be hereinafter referred to as the 100 per cent rule. This was done pursuant to directions of the Commission dated March 2, 1920, and April 15, 1920,* and to Section 208 (a) of the Transportation Act (41 Stat. L., 464) which required all rules and regulations in anywise affecting rates *or the value of the service rendered,* which were in effect on February 29, 1920, to remain in effect until changed by State or Federal authority(26, 35).

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*The April 15, 1920, direction of the Commission was the one involved in *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, 258 U. S., 377.

THE COMPLAINTS TO AND DECISIONS OF THE COMMISSION.

On January 11, 1921, the New River Company and its subsidiaries filed separate complaints with the Commission against the Virginian and Chesapeake & Ohio Railways. These complaints attacked the 100 per cent rule as unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act, and unduly prejudicial to joint mines and unduly preferential to local mines in violation of Section 3 of that act. These complaints were consolidated with each other and with other complaints of a similar character and hearing had thereon. The Slab Fork Coal Company and numerous other operators of local mines in the New River District intervened in opposition to the complaints (8, 24, 67).

On June 21, 1921, Division Five of the Commission (composed of three members) decided that the 100 per cent rule was unreasonable and unduly prejudicial to joint mines and unduly preferential to local mines, and held that during future car-shortage periods the defendant carriers should distribute cars to joint mines on this basis, to wit:

> "On days when the joint mine orders cars from only one carrier it shall have cars based upon its full rating from that carrier, and on days on which it orders cars from both carriers its rating on each of such carriers shall be 75 per cent of its full rating, subject to the limitation that it shall on no day be supplied with cars in excess of its maximum rating."

No order was entered, but the carriers were asked to amend their car-service rules conformably with the decision. *Fair-*

mont & Cleveland Coal Co. v. B. &O. R. R. Co., 62 I. C. C., 269. The new rule, hereinafter referred to as the 150 per cent rule, was promptly put into effect by the defendant carriers (8-9, 24-31).

Subsequently, the intervening local mine operators filed with the Commission a petition for reconsideration, reargument and consolidation of the cases with two other and similar cases then pending for hearing. (A copy of this petition is in the record herein, pp. 85-97.) The other cases had been filed by joint-mine operators in Illinois and Indiana. Hearing thereon was had, and all six cases were set for argument before a full bench of the Commission. On December 11, 1922, the Commission (one member dissenting) handed down its decision, holding that the 100 per cent was not "in principle unjust or unreasonable or unduly prejudicial," reversing its former conclusions, and dismissing all the complaints. *Bell & Zoller Coal Co. v. B. & O. S. W. Ry. Co.*, 74 I. C. C., 433. An order was entered in all six cases, including the two instituted by the New River Company and its subsidiaries. Pertinent language in this order reads as follows:

> "These cases being at issue upon complaints, answers, and intervening petitions on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:
>
> "It is ordered, That the complaints in these proceedings be, and they are hereby, dismissed" (9, 31-42).

On January 11, 1923, the New River Company and its subsidiaries filed with the Commission a petition to reopen the two cases in which the Virginian and Chesapeake & Ohio were defendants. These roads gave notice of their intention to restore the 100 per cent rule, effective February 1, 1923, and February 10, 1923, respectively (11). The Baltimore & Ohio and Monongahela Railways, the defendants to the two complaints filed by the Fairmont & Cleveland Coal Company, restored the 100 per cent rule effective December 11, 1922, and January 4, 1923, respectively (71). The railroads defendants to the complaints filed by the Illinois and Indiana joint-mine operators (*Bell & Zoller Coal Company et al.*), not having made any change in the 100 per cent rule on their respective lines, continued the same in effect (71).

Proceedings in the Court Below.

On January 29, 1923, and before the Commission had acted on their petition to reopen, the New River Company and its subsidiaries, West Virginia corporations, filed a bill in the United States District Court for the Southern District of West Virginia against the Virginian and Chesapeake & Ohio, corporations respectively of Virginia and West Virginia, the United States and the Commission, reciting many of the facts hereinbefore stated, referring to various paragraphs of sections 1 and 3 and all of sections 22 and 23 of the Interstate Commerce Act, and alleging in part as follows:

(*a*) That the decision, ruling and order of the Commission and the 100 per cent rule constitute "an encroachment upon and curtailment and denial of the legal right of complainants to the service of a common carrier in interstate

commerce on a parity with other shippers offering similar shipments to said carrier and the carrier's legal duty and legal and property right as a common carrier to serve complainants," thereby depriving complainants and each of them of their property and legal rights without due process of law and of the equal protection of the law, etc. (13).

(*b*) That the decision, order and 100 per cent rule are discriminatory against complainants as shippers of coal in comparison with shippers of other classes of merchandise (13).

(*c*) That the decision, order and 100 per cent rule authorize and require each of two competing carriers to act in combination one with the other to refuse any transportation of goods tendered to it if tendered to the other carrier, all in violation of the laws of the United States, etc. (14).

(*d*) That the decision, ruling and order of the Commission are without warrant in law and beyond the power of the Commission, and that the operation of the 100 per cent rule will result in great loss and irreparable damage to complainants, for which there is no adequate remedy at law (15).

The bill prayed that the two railway companies, the United States and the Commission be enjoined from enforcing or applying the 100 per cent rule, and that the United States and the Commission be enjoined from enforcing the decision and order of December 11, 1923; that the 100 per cent rule be adjudged in violation of the legal rights of complainants and null and void; that the decision and order of the Commission, in so far as it authorized or required the two railway defendants to put in operation the 100 per cent rule, be

adjudged beyond the power or authority of the Commission and null and void; and that the United States, the Commission and the two carriers be perpetually restrained and enjoined from restricting transportation service to complainants in accordance with the 100 per cent rule or any other decision, order or rule to the same effect (16-17).

On February 6, 1923, the cause came on for hearing before Circuit Judges Woods and Waddill and District Judge McClintic on the motion of complainants for a temporary injunction and the motions of the United States and the Commission to dismiss the bill (43-44). The Slab Fork Coal Company and numerous other local-mine operators, interveners before the Commission, applied for and were granted leave to intervene as intervening defendants, and likewise moved to dismiss the bill (61-66). The general grounds for these motions were—

(*a*) That the order entered December 11, 1922 by the Commission was a negative order and not subject to review by the District Court.

(*b*) That the subject matter of the decision, ruling and order of December 11, 1922, is one peculiarly within the jurisdiction of the Commission, and not within the jurisdiction of the District Court.

(*c*) That the bill is without equity (43-45, 65-66).

On February 8, 1923, the court (Judge Woods dissenting), without disposing of the motions to dismiss, granted a 60-day stay order, but required complainants to put up bond in the sum of $100,000.00 to indemnify the railway defendants against possible suits for damages (46-47).

On February 5, 1923, the Commission denied complainants' petition to reopen, whereupon complainants filed a supplemental bill making reference thereto (42). Intervening defendants, without waiving their motion to dismiss, filed an answer to the bill answering each and every allegation thereof, pointing out that they are active competitors of complainants in marketing coal, and showing among other things:

(*a*) That the 100 per cent rule recognizes the right of complainants to tender the shipping capacity of their joint mines and to request transportation of either or both of the railway defendants of the coal which can be produced by the joint mines, but the rule in effect requires the joint-mine complainants, as other rules in effect require the local-mine interveners, to accompany their daily orders for cars with *bona fide* contemporaneous tenders or setting aside of sufficient productive capacity to load and ship the aggregate number of cars ordered. The 100 per cent rule recognizes the common-carrier obligation of the railway defendants to furnish cars for loading, but such obligation is not called into play unless and until orders for cars and requests for transportation by whomsoever made are accompanied by actual or constructive tenders of sufficient coal to load the aggregate number of cars ordered on the particular day for which they are ordered (73-74).

(*b*) That the complaints filed by complainants with the Commission presented no issue of discrimination as between the complainant shippers of coal on the one hand and shippers of other classes of merchandise on the other (74).

(*c*) That it is necessary and desirable for carriers serving a joint mine to exchange information regarding the orders for cars placed by joint mines in order to prevent them from placing aggregate orders for cars in excess of their respective gross daily ratings and thereby falsely to represent that they have sufficient capacity or sufficient coal ready for shipment to load a greater number of cars than the number represented by their respective ratings (75).

(*d*) That the local-mine interveners have each invested large sums of money in their coal-mining properties and in developing their mines to their present rated capacity. They are so equipped as to capital, productive and selling organizations and other facilities to produce and market the full amount of coal which could be loaded and shipped in the number of cars represented by their respective just and reasonable *pro rata* shares of the available cars if joint mines, like local mines, were compelled to accompany their orders for cars with contemporaneous tenders of capacity to load and ship all cars ordered. But because of the operation of the 150 per cent rule, intervening defendants are being deprived of their respective just, reasonable and lawful shares of the cars available for coal loading on the lines of the railway defendants, and thereby suffering great and irreparable damage (78).

The Chesapeake & Ohio and Virginian filed separate answers, the Chesapeake & Ohio giving as its reason for attempting to restore the 100 per cent rule—

> "the danger of having to successfully defend suits for heavy damages, believed to approximate as much as $5,000.00 per day, supported by a decision and a reparation order of the Commission which it is be-

> lieved would have automatically followed the failure of respondent to have observed the rule prescribed by the Commission in the Bell & Zoller Case (Article XIII, Rec. 54),

and the Virginian—

> "not because of fear and duress of the penalties that might be imposed by law, but because this respondent considers that said decision of the Interstate Commerce Commission imposed upon it an obligation to put said rule into effect" (Article X, Rec. 48).

The United States and the Commission elected to stand on their motions to dismiss and declined to plead further. The cause came on for final hearing before the same judges on March 30, 1923, on the pleadings, motions to dismiss, and certain evidence of complainants in respect to the question of irreparable injury, and on August 10, 1923, a majority of the court (Judges Waddill and McClintic) joined in a final order and decree, in which it was adjudged and decreed:

(*a*) That the order of December 11, 1923, of the Interstate Commerce Commission, whereby Rule 4 of Circular C. S. 31, Revised (100 per cent rule), is promulgated and put into effect and authorized, is without warrant in law and is null and void.

(*b*) That said order and said Rule 4 of Circular C. S. 31, Revised, promulgated and authorized thereby, are hereby set aside and annulled.

(*c*) That the United States, the Interstate Commerce Commission and the carriers defendant herein, and each of

them, are perpetually restrained and enjoined from restricting, in accordance with said order of December 11, 1922, of the Interstate Commerce Commission, and of Rule 4 of Circular C. S. 31, Revised, thereby promulgated and put into effect and authorized, the transportation rights in interstate commerce of the complainants and from so restricting said service by or through any other order or rule to the same effect.

APPEALS TO THIS COURT.

The United States and the Commission joined in the appeal in No. 627; the intervening defendants, in the appeal in No. 628. The defendant railways have not appealed.

On the record, the appellants in No. 628 contend—

1. That the 100 per cent rule does not deprive joint mines of any legal right or relieve the railroads of any common-carrier obligation either at common law or under the Interstate Commerce Act. On the contrary, the operation of the rule is required by the common law and by express provisions of the Interstate Commerce Act.

2. That, if the 100 per cent rule is not required by express provisions of the act, it is within the administrative functions and power of the Commission to prescribe.

3. That, regardless of whether the order of December 11, 1922, was in effect an affirmative prescription of the 100 per cent rule by the Commission, the District Court erred in enjoining either the order or the rule.

4. That the action of the District Court in substituting its judgment for that of the Commission has created discrimina-

tory situations wholly incompatible with the Interstate Commerce Act.

5. That the order of December 11, 1922, was in fact a mere negative order both in form and substance, a mere denial of affirmative relief sought, in respect to a question within the authority and jurisdiction of the Commission and not subject to review by the District Court.

Specification of Errors.

I.

The United States District Court for the Southern District of West Virginia erred in denying the motions to dismiss and in not sustaining the motions.

II.

The said District Court erred in entering the decree and order dated August 10, 1923, in this cause.

III.

The said District Court erred in ordering, adjudging and decreeing that the order of the Interstate Commerce Commission dated December 11, 1922, be set aside and annulled.

IV.

The said District Court erred in ordering, adjudging and decreeing that Rule 4 of Circular C. S. 31, Revised, of the defendant railway companies be set aside and annulled.

V.

The said District Court erred in perpetually restraining and enjoining the Interstate Commerce Commission, the United States of America, and the defendant railway companies, from—

> "restricting, in accordance with said order of December 11, 1922, of the Interstate Commerce Commission, and of Rule 4 of Circular C. S. 31, Revised, thereby promulgated and put into effect and authorized, the transportation rights in interstate commerce of the complainants and their so restricting said service by or through any other order or rule to the same effect."

VI.

The said District Court erred in substituting its judgment for the judgment of the Interstate Commerce Commission concerning a regulation pertaining to the distribution of cars for the transportation of coal in interstate commerce.

VII.

The said District Court erred in reaching the conclusion that it had jurisdiction of the subject-matter of this suit.

ARGUMENT.

The bill of complaint which started this controversy makes no attack upon rules 1 and 7 to the effect that, in times of car shortage, the *pro rata* share of the available cars to which each mine is entitled shall be based upon its daily rating or its daily order if less than its rating. Nor does it make any attack upon that part of Rule 4 which requires that orders for cars shall be on file with the car distributor at 4 p. m. of the day before the cars are desired for loading. Under this provision, the order of a given mine may be placed before 4 p. m., but it must remain with the car distributor and be on file with him at 4 p. m. if it is to be given consideration along with the orders of the other mines received up to and at that time. This is so because the cars available on the following day are to be divided *pro rata* among the mines; each mine is to receive that share of the available pool of cars which is represented by the percentage which its car-order on file at 4 p. m. bears to the total car-orders on file at 4 p. m.

It was the position of complainants in the court below, and we assume it will be the position of appellees here, that a joint mine has a "legal right" to tender its entire gross rating to one of two carriers at or before 4 p. m. on a given day, and tender part or all of its gross rating to the second carrier at or before 4 p. m. on the same day, the aggregate of the two tenders being more than 100 per cent of its gross daily rating, and that it is the duty and obligation of the two carriers to allot the mine *pro rata* shares of the cars available on their respective lines on the following day on the basis of tenders thus artificially inflated. The whole case of complainants, appellees here, is predicated upon this assumed "legal right"

of a joint mine and this assumed duty and obligation of a common carrier. The local-mine operators on whose behalf this brief is filed insisted throughout the proceedings before the Commission and in the court below, and shall maintain in this court, that the foregoing assumptions are wholly untenable and that the bill and the contentions of opposing counsel are based upon a fundamental error of law in respect to the common-carrier duties and obligations of railroads regarding the furnishing of cars. If the foundation of the bill is wrong, the case settles itself. The question as to what are the duties and obligations of common carriers in the premises will therefore be considered first.

I.

The Hundred Per Cent Rule Does not Deprive Joint Mines of any Legal Right or Relieve Railroads of Any Common-carrier Duties or Obligations. On the Contrary, the Rule is Mandatory upon Railroads, Both at Common Law and Under the Interstate Commerce Act, and the District Court Therefore Erred in Annulling it.

The Rule is Consistent with and in Fact Required by the Common Law.

1. It is the duty of every common carrier to receive and carry the goods of any person tendered to it for transportation. As conditions precedent to this duty and obligation of the carrier, there must be a tender by the shipper of the specific goods to be transported, the goods must be ready and fit for shipment, and the tender must be for immediate transportation. Until these conditions are complied with by the

shipper, there is no obligation whatsoever on the part of the carrier; these conditions are the steps necessary to initiate the relation of shipper and carrier. The carrier cannot be held liable for failure to discharge its obligation to furnish transportation unless the shipper can show that the relation of shipper and carrier existed, or was sought to be established, with respect to specific goods which were identified at the time of the alleged tender for shipment. If the goods are yet to be graded, classified, marked or set apart from others by the shipper, they cannot be deemed to have been tendered to the carrier for transportation. If the shipper retains any dominion over the goods, be it ever so slight, the tender is incomplete. The goods must be entirely surrendered to the carrier, they must be in the absolute possession and under the undivided control and authority of the carrier before it can be said that the duty and obligation of the carrier has attached.

Corpus Juris on Carriers, 10 C. J., Sections 54, 57.
Hutchinson on Carriers (3rd Ed.), Sections 105, 112, 119, 125, 143.
Elliott on Railroads, Sections 2210, 2213.
Little Rock & Ft. S. Ry. Co. v. Conatser, 33 Southwestern, 1057.
St. Louis, I, Mt. & S. R. Co. v. Knight, 122 U. S., 79.
Missouri Pacific Railway v. McFadden, 154 U. S., 155, 160-161.
Hannibal & St. Jo. R. R. Co. v. Swift, 12 Wallace, 262.
Pratt v. Grand Trunk Ry. Co., 95 U. S., 43.

It follows that if a shipper has only 100 cases of goods, or has the capacity to get ready for shipment only 100 cases of goods, he cannot possibly tender to one or more carriers for transportation more than 100 cases. It would be physically

impossible for the shipper to tender the same 100 cases to two different carriers at the same time. The law will not presume that these 100 cases of goods can be in two places at the same time, *i. e.,* delivered for immediate shipment to two different carriers at the same time. Nor will the law presume that two carriers can assume a contemporaneous obligation and duty in respect to the same lot of goods. If the shipper has only 100 cases of goods and makes a legally enforceable tender and delivery of 75 cases to one carrier, he has remaining only 25 cases which can be made the subject of a tender to the second carrier.

2. As a corollary to the rule above discussed, a common carrier by railroad is required upon reasonable request to furnish cars for the transportation of goods over its lines. This duty and obligation is not created by any agreement or promise of the carrier to provide transportation, but arises from the tender of goods by the shipper and his request for cars in which to load them for transportation. To make this obligation effective, the tender must be made of goods set apart and ready for shipment.

Corpus Juris on Carriers, 10 C. J., Sections 66, 67, 70.
Hutchinson on Carriers (3rd Ed.), Sections 495, 511.
Elliott on Railroads, Sections 2219, 2225.
Eastern R. Co. v. Littlefield, 237 U. S., 140, 145.
Ritchie & Gilbert Co. v. Northern Pacific Ry. Co., 125 Northwestern, 897, 899.
Wilder v. St. Johnsburg & L. C. R. Co., 30 Atlantic, 41.

A review of the foregoing authorities makes clear that before a railroad is obligated to furnish cars, or to consider the request of a shipper for cars, an actual or constructive tender of the specific goods to be transported must be made by the

shipper. As, in contemplation of law, the tender of the precise goods to be shipped accompanies and is tied up with the request for cars, it follows that it is impossible for a shipper to make a full and complete tender of the same goods to two different carriers at the same time. The law indulges the fiction that, as an incident of the request for cars, the goods to be transported have been brought to the carrier and offered, *surrendered and delivered* to it for transportation; the same goods could not be offered, surrendered and delivered to two different carriers at the same time. To put it another way, when certain goods are tendered to a carrier accompanied by a request for cars in which to load them, the duty of that carrier arises then and there; that duty could not as a matter of law be acquired by another carrier in respect to the same goods at the same time.

3. The law recognizes, however, that a railroad's car supply may be legally sufficient and yet not sufficient to meet the demands of all shippers in all contingencies. The right of the shipper to cars is not an absolute right, and the carrier is not obligated to furnish sufficient cars to load all the freight offered in times of stress or unusual demand. But when the carrier is unable to furnish sufficient cars to load all the freight tendered and set apart for shipment, the available cars must be divided among the shippers demanding them in some fair and just way, such as the order in which the requests for cars are received, or *pro rata* in accordance with the quantity of goods which the respective shippers tender and set apart ready for immediate shipment.

Corpus Juris on Carriers, 10 C. J., Sections 67, 68, 70.
Hutchinson on Carriers (3d Ed.), Sections 495, 512.
Elliott on Railroads, Section 2217.

Pennsylvania R. Co. v. Puritan Coal Mining Co., 237 U. S., 119, 133-134.
Ayres v. Chicago & N. W. Ry. Co., 37 Northwestern, 432, 436.
State v. Chicago, B. & Q. R. Co., 99 Northwestern, 308, 310.

The inability of the carrier to supply all demands for cars does not relieve the shipper of the precedent requirement to accompany his demand for cars with a *bona fide*, concomitant tender and setting apart of the goods ready for shipment. The shipper must show his good faith in some way. In the last case above cited the court, in determining what part of the defendant's available cars the plaintiff grain shipper was entitled to receive, refused to take into consideration 4,500 bushels of grain on the farm of plaintiff four miles from the shipping station. As *Hutchinson on Carriers*, Section 495, puts it:

> "If owing to an unexpected influx of business, there results a temporary scarcity of such facilities, he (the carrier) will be entitled to apportion the same in an equitable manner, having in mind their relative volume of business, facilities for loading, *and the merchandise in sight*."

As already indicated, a full and complete, *i. e.*, legally enforceable, tender of the same goods cannot, as a matter of law, be made to two different carriers at the same time. The same merchandise cannot be "*in sight*" of two carriers at the same time—that is, sufficiently to give rise to a concurrent duty to furnish cars therefor. The merchandise must be actually or constructively tendered, *delivered and surrendered* to one carrier or the other; the same merchandise

cannot be contemporaneously tendered, delivered, and surrendered to both carriers. It follows that if a shipper has only sufficient goods ready for shipment to load 100 cars, he cannot possibly make a legal tender of sufficient goods to load 150 cars or 200 cars, even though the request for cars is divided between two carriers.

4. So it is with coal. While coal cannot ordinarily be made ready for shipment until the cars are received, the same rules of law as to tender nevertheless apply. Indeed, it has been held in Illinois that a carrier is not obligated to furnish cars for coal not yet mined and ready for shipment.

Illinois, etc., R. Co. v. People, 19 Ill. Appeals, 141; affirmed, 14 Northeastern, 261.

The maximum tonnage which a mine can legally tender for transportation in a single day is measured by the maximum amount which it can mine, load and forward in a single day. If a mine can produce only 100 carloads of coal per day, it cannot make a fully qualified tender to the carrier or carriers serving it of more than 100 carloads of coal per day. Nor can it, as a matter of law, make a fully qualified or legally enforceable tender of the same coal or physical capacity to produce and load the same coal to two different carriers on the same day, as the law will not presume that two carriers can acquire a contemporaneous obligation to furnish cars for the same lot of coal. If a mine with a physical capacity to produce 100 carloads of coal per day tenders and sets apart 75 car loads to one carrier, the obligation of that carrier with respect to that coal attaches immediately; the maximum amount which the same mine can tender and set apart on the same day to a second carrier in a way which

will call into play the common-law duty and obligation of that carrier is 25 carloads, as 100 carloads is all the coal the mine has capacity to produce and tender in one day.

5. The rule in issue here limits the orders for cars by a joint mine to 100 per cent of its gross daily rating or capacity to produce and load coal. It is designed merely to enforce a truth, and that is that a mine cannot possibly make a fully qualified and legally enforceable tender of more coal on a given day than it can produce and make ready for shipment on that day. The gross daily rating of a joint mine is the measure of its maximum capacity to tender for shipment, and a provision which polices and enforces the common-law rule that the available cars of a carrier shall be distributed *pro rata* among the mines in accordance with their respective duly qualified tenders for shipment is in no sense a limitation on or curtailment of the common-law obligations of the carrier or carriers.

Any contention that the capacity of a joint mine to tender for shipment is by some legerdemain increased when the tender is made to two carriers is a legal absurdity. If a joint mine with a gross daily rating of 100 cars per day orders 75 cars from each of two carriers for loading on a certain day, it is conclusive evidence that the mine has not made a full, complete, and legally enforceable tender of the coal tied up with one or both of the orders for cars. If a duly qualified and enforceable tender of sufficient coal or capacity to load 75 cars has been made to one of two carriers, it is simply beyond the capacity of that joint mine to make a further tender of more than 25 carloads to the second carrier. The maximum capacity of the mine to make fully qualified tenders—tenders sufficient in law to give rise to the concurrent

obligations of the one, two or more carriers—is measured exactly by its maximum capacity to produce and make ready for shipment, *i. e.*, by its gross daily rating.

6. This court has held that, "in case of car shortage occasioned by unexpected demands, they (the carriers) are bound to treat shippers fairly, if not identically." *Pennsylvania R. Co. v. Puritan Coal Min. Co., supra.* The highest court of the State of Wisconsin has held that, during such periods, "the rights of all shippers applying for cars under the same circumstances are necessarily equal." *Ayres v. Chicago & N. W. Ry. Co., supra.*

Rule 1, reading, "The daily rating or the daily order for cars if less than the rating shall be the basis for car distribution," in effect requires a local mine to comply with the common-law rule to make a fully qualified tender of capacity to load and ship the number of cars ordered, *i. e.*, to accompany its order with a contemporaneous tender of capacity to load and ship the number of cars ordered. By providing that "the raily rating *or the daily order if less than the rating* shall be the basis for car distribution," the rule in effect provides that orders for cars *in excess of the rating* will not be recognized or considered for the reason that, to the extent of the excess, such orders are not backed up with *bona fide,* concomitant tenders and therefore give rise to no duty or obligation of the carrier.

The 100 per cent rule has the effect of compelling a joint mine, when ordering cars from two or more carriers, to make the same fully qualified tender of its coal as is required of a local mine. It is at once a rule and a police regulation to enforce the rule; it is merely a convenient means of requiring

joint mines, like other rules require local mines, to comply with the common-law rule to accompany all orders for cars with contemporaneous tenders of capacity to load and ship the number of cars ordered on the particular day for which they are ordered. It is not a limitation on the legally enforceable common-law obligations of the carriers; it is a definition based upon truth and law of the extent of those obligations when a joint mine orders cars from two or more carriers in times of car shortage.

7. In a brief submitted to the court below, counsel for complainants, appellees here, gave numerous illustrations of the operation of the rule followed by contentions predicated thereon. We take the liberty of quoting the following:

> "When carrier 'A' is offered 200 cars of coal and accepts for shipment only 160 cars on account of short car supply, he rejects 40 cars. There is then no obligation on the shipper to hold these 40 cars of coal for 'A' and no right or obligation whatever as between the shipper and 'A' with reference to them. The contract of carriage is concluded between the shipper and 'A' and applies only to the 160 cars of coal which 'A' has accepted and that is all that the shipper is required to hold for 'A.'
>
> * * * * * * *
>
> "The illustrations heretofore given make it clear that when the order is accepted on Monday for cars that constitutes a contract for the carriage of such coal as may be loaded in the number of cars agreed to be furnished. * * * The balance of the shipper's offer of such coal is rejected by carrier 'A' on Monday afternoon and is, therefore, available at that time for offer for Tuesday's loading to carrier 'B.'"

The foregoing illustration is misleading and fallacious. It is based upon the impossible assumption that the mine and carriers know before 4 p. m. on Monday what will transpire after 4 p. m. of that day and on the following day. Note this statement of the illustration: When a joint mine with a gross daily rating of 200 cars tenders its entire output to carrier "A" on Monday for loading on Tuesday, and that carrier has only an 80 per cent supply available on Tuesday, the mine has 40 cars which it can tender to carrier 'B' on Monday for loading on Tuesday.

Rules not attacked in the bill provide that all orders for cars shall be on file with the car distributor at 4 p. m. of the day before the cars are desired for loading; orders for cars desired for loading on Tuesday must be filed on Monday. Before 4 p. m. on Monday the carrier does not know how many cars the mines will desire for loading on Tuesday, nor does it know how many cars it will have available for loading on Tuesday. *And these two facts must be known before the pro rata share of any mine or the percentage supply of all mines can be determined.* There is therefore no foundation for the contention that the carrier contracts on Monday to furnish a definite number of cars for loading on Tuesday, or that it rejects on Monday any coal tendered for loading on Tuesday.

Assume that the aggregate rating of all mines served by a certain carrier is 1,000 cars per day, divided equally between joint mines and local mines. That carrier has no means of knowing, before 4 p. m. on Monday, how many cars those mines will require for Tuesday's loading. The joint mines may order their aggregate rating of 500 cars from the other carrier, or they may split their orders between the two car-

riers in different ways as they have the right to do under the rule. Or some of the mines, on account of local labor strikes, breakdown of machinery, or other temporary disability may order no cars whatsoever, or perhaps less than their respective ratings. It will be remembered that the rules provide that the available cars shall be distributed *pro rata* among the mines in accordance with their daily ratings *or their daily orders for cars if less than their ratings.* Obviously, the *pro rata* share of the available cars to which any given mine will be entitled on Tuesday cannot be determined until *after* 4 p. m. on Monday when the orders of all the mines have been received and tabulated.

Furthermore, the carrier does not know even as late as 4 p. m. how many cars it will have available for loading on the following day. The empty cars which will be available for loading on a given day are received continuously during the previous day and night, so that the aggregate supply of cars is not definitely known until the early morning of the day the cars are to be distributed (Record, 133). And, until the carrier knows how many cars it will have available for loading on a given day, it has no way of determining the percentage supply which it will be able to furnish.

To return to the illustration—if a joint mine with a gross daily rating of 200 cars tenders its entire output to carrier "A" on Monday for loading on Tuesday, that tender must remain in the possession and under the undivided control of carrier "A" until after 4 p. m. on Monday in order to entitle the mine to a *pro rata* share of the available cars on that basis. If the orders of all the mines aggregate 1,000 cars for loading on Tuesday, the joint mine will be entitled

to 20 per cent of all the cars available on Tuesday, as its tender of 200 carloads is 20 per cent of the total tenders of 1,000 carloads. If the aggregate tenders turn out to be only 600 carloads it will be entitled to 33⅓ per cent of the available cars. The cars for loading on Tuesday will be ready for distribution Monday night or early Tuesday morning. Regardless of their number, the joint mine above referred to will be entitled to a *pro rata* share thereof based on the percentage which its order or tender of 200 cars on file at 4 p. m. on Monday bears to the total orders or tenders on file at 4 p. m. on Monday. *But if any part of its tender of 200 carloads is withdrawn before 4 p. m. on Monday, the basis of its pro rata share of the cars available on carrier "A" on Tuesday is automatically and correspondingly reduced.* On the other hand, if its tender of 200 carloads remains in the possession and control of carrier "A" until after 4 p. m., it cannot make any tender to carrier "B" on that day, as its maximum capacity to tender is represented by its gross daily rating of 200 cars.

8. Let us assume for the moment that, when a joint mine with a gross daily rating of 200 cars tenders its entire output on Monday to carrier "A" for loading on Tuesday and that carrier has an 80 per cent supply available on Tuesday, the contract thus completed on Tuesday relates back to some time before 4 p. m. on Monday in such a way that the mine still has available for tender on Monday 40 carloads of coal. Now if this 40 carloads of coal is free and subject to be tendered, why can't the joint mine again offer it to carrier "A"? And, after the mine has acquired "credit" for an additional 32 cars (80 per cent of 40), what is to prevent it from again offering the remaining 8 cars to carrier "A," and

so on *ad infinitum?* If the difference between the tender to the carrier on Monday and the cars the mine will receive on Tuesday is by some legerdemain still under the control of the mine and the subject of retender on Monday, it may be again offered to the same carrier quite as logically as it may be offered to the second carrier. This imaginary remainder is free coal or it is not; if it is free coal, it may be offered to any carrier because such is the "legal right" of the mine.

Now if the joint mine has a "legal right" to consider rejected on Monday so much of its tender as is actually rejected on Tuesday, a local mine most certainly has a similar "legal right" and entitled to go through a similar process of offering and reoffering its "rejected" coal. For, to use the words of this court in *Pennsylvania R. Co. v. Puritan Coal Mining Co., supra,* "in case of car shortage occasioned by unexpected demands, they (the carriers) are bound to treat shippers fairly, if not identically," and the words of the Supreme Court of Wisconsin in the *Ayres case, supra,* "the rights of all shippers applying for cars under the same circumstances are necessarily equal."

The fact is that the tender of 200 carloads of coal made by the joint mine before 4 p. m. on Monday to carrier "A" remains in the possession and control of that carrier until after 4 p. m. on Monday, *else the mine would not be entitled to a pro rata share of the cars available on Tuesday on the basis of such a tender.* And after 4 p. m. on Monday, it is too late for the mine to make any tender to carrier "B." If, notwithstanding the *bona fide* tender of its entire gross daily rating to carrier "A," the mine is given the "legal right" to make a fictitious tender of say 40 carloads of coal to carrier "B," it certainly could not be said that the fictitious tender

of 40 carloads by the joint mine is presented "under the same circumstances" as a *bona fide* tender of 40 carloads by a local mine. If the two tenders are not presented under similar circumstances, the rights of the two mines are not "necessarily equal." It would not be treating shippers "fairly" or "identically" if a joint mine were allotted the same *pro rata* share on a fictitious tender of 40 carloads of coal as was a local mine on a *bona fide,* legally enforceable tender of 40 carloads.

To illustrate further, suppose a manufacturer of shoes in St. Louis has 100 cases of shoes for shipment to Chicago over one or more of the numerous carriers serving those cities. It is the practice of carriers to keep open their freight-receiving stations each week day until a specified hour in the afternoon, say 4 o'clock, and to accept for shipment each day all freight offered, surrendered and delivered over the platforms of their stations up to and at that hour. Now assume that the carriers serving St. Louis have established a rule that, in times of heavy traffic, the available car space in their outbound freight trains to Chicago will be divided *pro rata* among the shippers in accordance with the quantity of goods which they (the shippers) have delivered to the carriers on the platforms of their freight-receiving stations *up to and at 4 p. m.* May the shipper with the 100 cases of shoes take the entire 100 cases to one carrier on a day when there is likely to be a shortage of car space in outbound trains and, while actually delivering and surrendering possession of only 75 cases to that carrier, get "credit" in some way for delivering and surrendering 100 cases so as to be entitled to a *pro rata* share of the available car space on the basis of 100 cases? Has that shipper a "legal right" to a *pro rata* share of

the available transportation on the basis of 100 cases of goods, when he has delivered and surrendered to the carrier only 75 cases? Has he a "legal right" to the same *pro rata* share of the available car space as a competing shipper who has actually delivered and completely surrendered to the same carrier on the same day 100 cases of goods? Has the first shipper a "legal right" to the same *pro rata* share of the available car space on the basis of his bogus tender of 25 cases, as a competing shipper who has made a *bona fide* tender and delivery of 25 cases? Are the bogus tender of 25 cases by the first shipper and the *bona fide* tender and delivery of 25 cases by the competing shipper presented under the same circumstances? Would it be treating shippers "fairly" or "identically" if the same consideration were given to such fictitious tenders as was given to *bona fide* tenders? Common-law principles of justice and fairness require that all these questions be answered in the negative.

Again, suppose the freight-receiving station and all its contents were totally destroyed by fire just before the station was to close for the day, would the crafty shipper above referred to who had actually delivered and surrendered to the carrier only 75 cases of goods be entitled to recover damages for the value of 100 cases? Assume that that shipper, with only 100 cases of shoes to ship, makes "tenders" of 75 cases to each of two carriers on the same day in such a way that he claims *pro rata* shares of the available car space on such bases and that the freight-receiving stations of both carriers are destroyed, will those carriers each be liable for the loss of 75 cases? Of course not. A carrier is not liable for goods which are not completely surrendered into its possession and under its undivided control; *a fortiori*, it

acquires no duty to transport unless and until the goods are actually or constructively delivered to it for transportation. And it acquires no duty to furnish cars to a joint coal mine, or to set aside any part of its available supply of cars to a joint mine, or to "credit" a joint mine with a "tender" as a basis for a *pro rata* share of the available cars, unless and until that mine shows its good faith by setting apart sufficient coal or sufficient capacity to load the number of cars ordered.

9. At common law an order for cars must be accompanied by an actual or constructive tender of the property to be shipped before any duty or obligation of the carrier will attach. The tender must remain in the possession and under the undivided control of the carrier. The 100 per cent rule compels joint mines, as other rules compel local mines, to comply with this requirement of the common law. It is merely one integral part of a body of rules whose application and operation are necessary to insure equality of treatment to all mines in times of car shortage, *including joint mines which do not split their tenders between the carriers serving them.* The 100 per cent rule is not in contravention of the comomn law; it is in fact required by the common-law rule of tender and the common-law rule of identity of treatment under similar circumstances.

THE 100 PER CENT RULE IS REQUIRED BY EXPRESS PROVISIONS OF THE INTERSTATE COMMERCE ACT WITH WHICH THE CARRIERS ARE BOUND TO COMPLY WITHOUT ANY ADMINISTRATIVE ACTION BY THE COMMISSION.

The particular provisions here relied upon are paragraphs 2 and 4 of Section One, and paragraph 12 of the same section.

The Significance of Paragraphs 3 and 4.

1. These paragraphs, in so far as they are pertinent here, are as follows:

> Paragraph 3: The term "transportation," as used in this Act, shall include * * * cars * * * and all instrumentalities and facilities of shipment or carriage * * *.
>
> Paragraph 4: It shall be the duty of every common carrier subject to the Act, engaged in the transportation of passengers or property, to provide and furnish such transportation *upon reasonable request therefor.* (Italics mine.)

While there was a definition of the term "transportation" in the original act, it was made more specific by the amendment of June 29, 1906. Paragraph 4 of Section 1 was not in the original act; it was also added by the amendment of June 29, 1906. These provisions have been declared by the Commission and also by this Court to be merely a "statement of common-law obligations which already existed."

> *Annual Report of Commission for Year 1906,* page 17.
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> *Pennsylvania R. R. v. Sonman Coal Co.,* 242 U. S., 120, 125.

2. At common law, a naked request for transportation is not entitled to any consideration by the carrier; it does not initiate any obligation on the part of the carrier. To give rise to the obligation of the carrier, the request must be accompanied by a tender, an actual or constructive bringing, delivering, and surrendering to the carrier, of the specific

goods to be transported. If the goods are not physically brought to the carrier and offered to it for transportation, they must be set apart and otherwise identified with the request for cars.

A statute in affirmance of the common law is construed and interpreted in accordance with the common law.

Sutherland on Statutory Construction (2d Ed.), Sections 329-330, 454-456.

Statutes and Statutory Construction, Fed. Stat. Ann. (2d Ed.), vol. 1, p. 121.

Cumberland Telephone & Telegraph Co. v. Kelly, 160 Fed., 316, 321 (by Circuit Judge Lurton, afterward Justice Lurton).

Kepner v. United States, 195 U. S., 100.

It follows that when the Congress incorporated into the act provisions declaratory of the common law, it also adopted the common-law construction thereof. Therefore, when the Congress incorporated into the act a provision that it shall be the duty of common carriers to provide and furnish transportation (including cars) *upon reasonable request therefor,* it also adopted the common-law rule that a request for transportation must be accompanied by a *bona fide* tender of the property to be transported—by an actual or constructive bringing, delivering and surrendering to the carrier of the specific goods to be shipped, in such a way that the goods may be identified with the request for transportation.

3. Accordingly, if a joint mine has a gross daily rating or shipping capacity of 100 cars, it cannot possibly make full, complete and legally enforceable tenders of more than 100 carloads of coal per day; it cannot make reasonable requests for more than 100 cars per day. That mine cannot

make full, complete and legally enforceable tenders of more than 100 carloads of coal per day, even though its requests are addressed and its tenders offered to more than one carrier during a period of car shortage. If that mine tenders its entire capacity to one carrier on a given day for loading on the following day, it has no capacity remaining to make the subject of a tender to a second carrier on the same day; if it tenders 75 carloads of coal to one carrier, it cannot tender more than 25 carloads to the second carrier, as its capacity to make fully qualified tenders is 100 carloads of coal per day and no more.

The Requirements of Paragraph 12.

1. While no reliance is placed here upon paragraph 11 of Section 1, it is quoted below along with paragraph 12, in order to show by contrast the exceptional character of the mandatory requirement contained in the second sentence of paragraph 12.

> Paragraph 11: It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulations, and practice with respect to car service is prohibited and declared to be unlawful.
>
> Paragraph 12: It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car

> supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States.

It will be noted that paragraph 11 is a statement of general duties, and the first sentence of paragraph 12 a statement of a special duty, imposed upon every carrier. Paragraph 11 imposes upon every carrier the general duties (*a*) to furnish safe and adequate car service and (*b*) to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service, while the first sentence of paragraph 12 imposes the special duty (*c*) to make just and reasonable distribution of cars for transportation of coal among the mines served by it and its dependent connections.

On the other hand, the second sentence of paragraph 12 is in the nature of a proviso to the first sentence. It is not a statement of a general duty; *it is a definition of the* PRECISE *way in which a* SPECIAL *duty* MUST *be performed during* CERTAIN *periods.* Where a statute directs the performance of a certain duty in a particular manner, it forbids by

implication every other manner of performance. *Expressio unius est exclusio alterius.*

Southerland on Statutory Construction (2d Ed.), Sections 491-493.
Corpus Juris, vol. 25, page 220.

While the law requires every carrier, *during periods of car surplus,* to make just and reasonable distribution of cars among the mines and leaves the question of what is just and reasonable distribution of cars to the discretion of the carrier in the first instance and of the Commission on complaint; *during periods of car shortage,* the second sentence of paragraph 12 of Section 1 specifies the particular manner in which the cars are to be distributed and leaves nothing regarding distribution to the discretion of either the carrier or the Commission. And to the prescription of the particular manner in which that duty must be performed, the Congress attached a specific and severe penalty. The Congress made failure or refusal "so to do" unlawful and imposed a forfeiture of $100 for each offense.

There may be room for the exercise of discretion by the carrier and the Commission in fixing the mine ratings applicable during periods of car shortage, but the bills makes no attack upon the justness or reasonableness of mine ratings or of the rules which determine them.

2. The first significant fact to be noticed is that the law goes further than to require the carrier to MAINTAIN just and reasonable ratings, *i. e.,* to keep such ratings in existence. It also requires the carrier to APPLY such ratings. To APPLY is to put into practical operation. *Century Dictionary,* 2.

What is a rating? A rating is the measure of the maximum capacity of a local mine to tender coal for shipment to the single carrier serving it. What is a gross rating? It is the measure of the maximum capacity of a joint mine to tender coal for shipment to the two or more carriers serving it. It follows necessarily and inevitably that, to put into practical operation the gross daily rating of a joint mine, it is incumbent upon a given carrier to make sure that the tender of such a mine is genuine and not fictitious—that the mine's request for cars is accompanied by a concomitant tender and setting aside of sufficient capacity to load the number of cars ordered on the particular day for which they are ordered. To do this, it is necessary for each carrier serving a joint mine to police the tenders and orders of the mine, and to take into consideration tenders to the other carriers serving the mine. If a joint mine has a rating or capacity to tender 100 carloads of coal per day, it would most certainly not be putting that rating into practical operation if one of the two carriers serving the mine would take into consideration and accept from that mine (after the mine had made a *bona fide* tender of 75 carloads of coal to the other carrier) a tender of more than 25 carloads of coal. *The mandate of the statute is to apply the rating of the mine, not an artificial inflation of the rating.* To put a joint-mine rating into practical as opposed to theoretical or speculative operation, the carrier cannot consider, as a basis for determining the mine's *pro rata* share of the available cars, any artificial or fictitious tenders of that mine.

The second significant fact to be noticed about the language of the law is that, while the first two mentioned duties of every carrier to MAINTAIN and APPLY just and reasonable

ratings of the mines are limited to the mines served by it and its dependent connections, the third mentioned duty to COUNT each and every car furnished is not limited to each and every car furnished by it and its dependent connections. The duty of every carrier to COUNT each and every car applies to each and every car furnished to or USED BY the mine, not alone to each and every car furnished to the mine by that particular carrier and its dependent connections, but also to each and every car furnished to the mine by any other carrier or carriers, if the mine is served by two or more carriers. If every carrier serving a joint mine puts into practical as opposed to theoretical or speculative operation the gross daily rating of such mine to make *bona fide,* legally enforceable tenders of coal for transportation, and counts each and every car *used by* the mine, it will be compelled to reject and not consider any tender made by the mine in excess of the difference between its gross daily rating and the amount of its *bona fide* tender on the same day to the other carrier; it will be compelled to consult the other carrier for the purpose of ascertaining how much of the mine's capacity has been set aside for account of such other carrier on the same day.

The number of cars furnished to or USED BY a joint mine on a given day of car shortage represents its *pro rata* share of the available cars based upon its rating or its order or orders if less than its rating. By requiring each carrier to count all cars furnished by all carriers to a joint mine on a given day, the law necessarily requires each carrier to count and consider all cars ordered by that mine from all carriers on that day. In no other way can the GROSS daily rating of the mine be put into PRACTICAL operation.

3. In this connection, it may be noted that a reasonable request for transportation by a mine is a condition precedent to the duty of the carrier to apply the rating of that mine. If on a certain day a given mine makes no request for cars, obviously the duty of the carrier to apply its rating on that day is not called into play. The carrier may be *maintaining* a rating of 100 cars per day for that mine because during the preceding month the mine demonstrated its capacity to load 100 cars per day, but on a certain day, because of labor trouble or a temporary breakdown of its machinery, it may not order any cars, *i. e.*, it may not make any request for transportation. If no demand for cars is made, no cars are furnished, and if no cars are furnished, there are no cars to count against the mine. It is therefore seen that an order for cars by a mine backed up with a concomitant tender of capacity to load and ship the number of cars ordered is the signal calling forth the duty of the carrier to apply and put into practical operation the rating of the mine.

It follows that, if a joint mine with a GROSS daily rating of 100 cars makes a *bona fide* tender of enough of its capacity to load 75 cars to one carrier on a given day, the just and reasonable rating of the mine on that day so far as that carrier is concerned is 75 cars. The mine now has sufficient capacity remaining to load 25 additional cars; if it orders cars from the second carrier on the same day, its maximum rating on that carrier is necessarily 25 cars, as its gross rating on both carriers is only 100 cars.

In this connection, the Circuit Court for the Northern District of Illinois said in *Chicago & A. R. Co. v. Interstate Commerce Commission*, 173 Fed., 930, 933:

> "The mine operators are objects of interest under the interstate common law, not as diggers of coal, but

as shippers who tender a commercial product for transportation by interstate common carriers. The basis, therefore, on which the mines in a district should be rated, is not their average output as a physical question, but the average output which they respectively tender for transporation in commerce. If two mines have capacities of producing 1,000 tons each per day, they should have the same rating if they are each offering the whole amount for transportation in commerce. But if one of these mines, by reason of exhaustion of a vein, or flooding of a shaft, or the operator's local consumption of his own fuel, can and does offer for transportation in commerce only 500 tons per day, equity requires that the carrier should rate it at only one-half of the other mine." (See note.)

4. That the law in effect requires the operation of the 100 per cent rule is further demonstrated by the impossibility of reconciling the law with the 150 per cent rule, or any other rule which would permit a joint mine arbitrarily to inflate its rating when it orders cars from two or more carriers on the same day.

The gross rating of a joint mine is obtained by dividing the total tonnage shipped by it during the preceding month

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NOTE.—This was the decision of the Circuit Court on the application of the railroads to enjoin the Commission's order in the *Trer Case*, 13 I. C. C., 451. The court refused to enjoin the order in so far as it applied to system cars, private cars, and foreign fuel cars, but did enjoin it in so far as it applied to company fuel cars on the theory that company fuel is not transported in commerce. Upon appeal, the Supreme Court decided that company fuel is transported in commerce, and reversed the court below on that point only. 215 U. S., 451. There is nothing in the decision of the Supreme Court which is inconsistent with the above-quoted views of the Circuit Court.

via all the carriers serving it by the number of hours worked in producing that tonnage, and multiplying the quotient by the number of hours (eight in the New River District of West Virginia) in the recognized work day. The result of this computation is the *gross* daily rating of the mine; it represents its aggregate productive and shipping capacity—its maximum coal-tendering capacity. So far as this case is concerned this result is the *just and reasonable* gross rating of the mine, as no attack is made in the bill of complaint against the gross ratings of the complainant mines or the foregoing rule for determining gross ratings. Now if the just and reasonable rating of a joint mine, according to the foregoing rule, is 100 carloads of coal per day, any rule or regulation which would give it an artificial rating of 150 carloads per day during periods of car shortage would be NECESSARILY unjust and unreasonable. And the artificially inflated rating would be NECESSARILY unjust and unreasonable. *For the just and reasonable rating of a mine is based upon its physical capacity to produce and tender coal for shipment, and not upon the number of carriers to which it may offer its coal for transportation.*

Under the 150 per cent rule, the rating of a joint mine is its actual shipping capacity when it tenders its coal to a single carrier, but 150 per cent of its actual shipping capacity when it tenders its coal to two or more carriers. In other words, under that rule, the rating of a joint mine is its just and reasonable rating when it tenders coal to a single carrier, but its just and reasonable rating artificially inflated 50 per cent when it tenders coal to two or more carriers. The positive mandate of the statute is to apply the just and reasonable rating of the mine, not an artificially inflated rating. *The*

statute makes no distinction between joint mines which tender their coal to a single carrier and those which tender their coal to two or more carriers.

Whenever the available car supply of the carriers serving a joint mine averages 67 per cent or better, the operation of the 150 per cent rule permitting such a mine arbitrarily to inflate its gross rating for the purpose of ordering cars to 150 per cent of its actual rating results in its receiving more than its loading capacity of cars. This is so because 67 per cent of 150 per cent is more than 100 per cent. For example, a joint mine with a rated loading capacity of 100 cars per day would be entitled to receive 120 cars on a day when it ordered 75 cars from each of two carriers having an 80 per cent supply available. As the demonstrated loading capacity of the mine is only 100 cars per day, both the inflated rating and the rule which permitted it are necessarily unjust and unreasonable. In an attempt to meet this situation, the Commission declared in its first decision in the case which culminated in this litigation that actual deliveries of cars to a joint mine should be limited to its actual rating or loading capacity (Record, 30). But what becomes of the positive and unqualified mandate of the statute that during periods of car shortage ratings shall be APPLIED? If a joint mine is given a rating of 75 cars on each of two carriers, or a gross rating of 150 cars on both carriers as a result of the 150 per cent rule, the statute then steps in and says that such ratings must be APPLIED. The simple plain truth is that such fictitious and artificial ratings cannot be applied in the manner required by the statute, and hence the ratings as well as the arbitrary rule which created them are unjust and unreasonable on their face.

It was also contended before the Commission that the intent and purpose of the Congress in requiring every carrier to maintain and apply just and reasonable ratings and to count each and every car furnished to or used by a mine against the mine was merely to abolish the practice of arbitrarily assigning cars to particular mines and not counting such cars against the distributive shares of such mines. The language of the law has the effect of prohibiting the practice of arbitrarily assigning to some mines a greater *pro rata* share of the available cars than to other mines on the same carrier, but there is nothing in the law to indicate that that was the only intent and purpose of the Congress. It is a cardinal rule of statutory construction that the legislative intent must be ascertained primarily from the language which the legislature has used and, if the language used is clear and free from doubt, it must be taken as the final expression of the legislative intent. It is also fundamental that the Congress is not to be presumed to have used superfluous words; if possible, some meaning must be given to every word in a statute.

Platt v. Union Pacific R. R. Co., 99 U. S., 48, 58-59.
Sturges v. Crowinshield, 4 Wheaton, 122, 202-203.
United States v. Goldenberg, 168 U. S., 95, 102-103.
Hamilton v. Rathbone, 175 U. S., 414, 419.
Caminetti v. United States, 242 U. S., 470, 485, 490.

In the *Caminetti case, supra*, the court held that—

> "When words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names

> or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent."

The language of the second sentence of paragraph 12 of Section 1 of the act making it the duty of every carrier, during periods of car shortage, to maintain and APPLY just and reasonable ratings of the mines served by it is clear and plain and requires a *pro rata* distribution of the available cars on the basis of ratings and, when read in connection with paragraph 4 of Section 1, making it the duty of every carrier to furnish cars *upon reasonable request therefor*, it requires a *pro rata* distribution on the basis of ratings or reasonable requests (requests backed up with concomitant capacity to load the number of cars requested) if such requests are less than the ratings. The very idea of a distribution on the basis of fictitious or artificially inflated ratings is abhorrent to the spirit and letter of the law. So, too, the language of the law making it the duty of every carrier to count each and every car furnished to or USED BY the mine against the mine is clear and plain and means exactly what it says, to wit, to count each and every car USED BY the mine whether furnished by one or more carriers.

It follows from what has been said that the District Court erred in annulling the 100 per cent rule.

II.

If the Hundred Per Cent Rule is Not Required by Express Provisions of the Interstate Commerce Act, it is Certainly Within the Administrative Functions and Power of the Commission to Prescribe or Approve.

1. The 100 per cent rule was one among many rules and regulations governing the distribution of coal cars during periods of car shortage. Indeed, it was merely part of one rule. This part of a rule limited the daily orders of a joint mine, on the basis of which its *pro rata* shares of the available cars of the carriers addressed would be determined, to 100 per cent of its daily capacity to load. The complaints filed with the Commission charged that this rule was (*a*) unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act, and (*b*) unduly prejudicial to the complainant joint-mine operators and unduly preferential to the local-mine operators in violation of Section 3 of the act. No attack was made upon the rules for determining the capacity of a mine to load cars, nor upon the rule that available cars shall be distributed pro rata among the various mines in accordance with their respective capacities to load cars or their daily orders for cars if for numbers less than their respective capacities to load.

By the prayer of the complaint, the Commission was asked to strike down the 100 per cent rule and to establish in lieu thereof "such other rules, regulations and practices as the Commission may deem reasonable and just." Thus, the complaint called upon the Commission to exercise its

administrative discretion in respect to a rule of car distribution, and to prescribe a rule which in its judgment would be within the zone of reasonableness and fairness.

2. A discussion of the allegations of the complaint in the light of the particular sections of the act alleged to have been violated by the 100 per cent rule will demonstrate conclusively that the questions presented were purely administrative in character and therefore within the jurisdiction of the Commission to determine.

(*a*) As stated at the outset, the basic contention of the joint-mine operators is that a joint mine may tender more than 100 per cent of its shipping and loading capacity to the two or more carriers serving it and receive *pro rata* shares of the available cars on the basis of such tenders. In other words, the contention is that a joint mine with a loading and shipping capacity of 100 cars per day may make requests for 150 or 200 cars per day and receive *pro rata* shares of the available cars on the basis of such requests.

Turning to the first of the particular sections of the Act alleged to be transgressed by the 100 per cent rule, which limits the daily requests of a joint mine to 100 per cent of its gross daily rating, it is found that section 1, paragraph 4, does not require carriers to furnish cars upon any and all requests. It requires carriers to furnish cars upon *reasonable* request, and reasonable request *only*. What is a reasonable request? The answer to this question is of controlling importance during periods of car shortage as, during such periods, the available cars are divided pro rata among the shippers demanding them in accordance with their *reasonable* requests.

We have taken the position up to this point that, when Congress incorporated into the act the provision making it the duty of carriers to furnish cars *upon reasonable request,* it also adopted the common-law rule that to call into play this duty of a carrier the shipper must accompany his request for cars with a *bona fide,* concomitant tender and delivery, actual or constructive, of sufficient goods ready for immediate shipment to load the number of cars ordered. If this does not follow, who is to determine what is a reasonable request? Who is to determine whether orders for cars given under a particular set of circumstances are reasonable or unreasonable?

It cannot be doubted that, by adopting the provisions referred to, Congress assumed paramount and exclusive authority over the subject of the furnishing of cars by carriers for the transportation of goods in interstate commerce. This was squarely held in *Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co.,* 226 U. S., 426, where this court declared invalid a statute of Minnesota requiring carriers to furnish cars within a certain number of days with penalties for each day's delay beyond the specified number, on the ground that Congress, by the adoption of paragraph 4 of section 1 of the Interstate Commerce Act, occupied the whole field of regulation in respect to the subject matter of that legislation. But the provision referred to, making it the duty of carriers to furnish cars upon reasonable request, does not define what is a reasonable request or prescribe a formula for determining what is a reasonable request. However, that provision was made part of the Interstate Commerce Act. By paragraph 1 of section 12 of that act the duty is laid upon the Commission to execute and enforce the provisions of the act, and by

section 15 the Commission is authorized and empowered to prescribe new regulations and practices in lieu of those found to be unjust, unreasonable or unduly prejudicial. It therefore follows that Congress has confided to the Commission the administrative authority to determine what is a reasonable request, just as it has confided to the Commission the administrative power and authority to determine what is a reasonable rate.

Invoking this administrative authority of the Commission, the joint-mine operators represented that two requests by a joint mine with a gross daily rating of 100 cars for an aggregate of 150 or 200 cars for loading on a given day are reasonable requests. The local-mine operators contended that such requests are unreasonable to the extent that they exceed the gross daily rating of the mine and that each of the two requests is unreasonable to the extent that, added to the other, the aggregate is in excess of the gross daily rating of the mine. Acting under and by virtue of its administrative authority, the Commission found that the 100 per cent rule, which limits the daily requests of a joint mine to an aggregate of 100 per cent of its gross daily rating, was not in principle unjust or unreasonable, and thereby adopted the common law rule that to be reasonable a request for cars must be accompanied by an actual or constructive tender of sufficient goods ready for immediate shipment to load the number of cars ordered. In other words, the Commission held that as the gross daily rating of a joint mine represents its maximum daily capacity to make ready for shipment and load coal, it is not unreasonable to limit its daily requests for cars to its gross daily rating.

(*b*) The next provisions of the law alleged to have been violated by the 100 per cent rule are paragraphs 11 and 12 of section 1. Paragraph 11 requires every carrier by railroad "to furnish safe and adequate car service and to establish, observe and enforce just and reasonable rules, regulations, and practices with respect to car service." The language of this paragraph in respect to car service follows closely that of paragraph 5 in respect to rates, consequently, so far as paragraph 11 is concerned, there is just as wide a field for the judgment of the Commission in respect to car service as there is in respect to rates.

The same thing is true of the first sentence of paragraph 12, requiring every carrier to make a just and reasonable distribution of coal cars among coal mines. And if, as we have hereinbefore contended, the second sentence of paragraph 12 of section 1 does not in effect require the maintenance and application of the 100 per cent rule, there is plenty of room for the exercise of judgment by the Commission in the administration of that part of the law. This is especially so when that part of paragraph 12 of section 1 is considered in connection with paragraph 4 of the same section.

The second sentence of paragraph 12, which applies only during periods of car shortage, requires every carrier to maintain and apply just and reasonable ratings and to count each and every car furnished to or used by a mine against the mine. Suppose a mine has a just and reasonable rating or loading capacity of 100 cars per day but on a given day, because of a local strike or a break-down of machinery, it makes no request for cars; is it the duty of the carrier to apply the rating of the mine on that day? Of course not.

The duty to apply the rating, like many other duties of the carrier, is one which arises only upon reasonable request. And, as the law does not define what is a reasonable request, it is for the Commission to determine the qualifications of a reasonable request and therefore to prescribe the circumstances and conditions under which the duty of the carrier to apply the rating of a mine may be called into play from day to day. By holding that the 100 per cent rule is not in principle unjust or unreasonable within the meaning of section 1, the Commission in effect held that as the gross daily rating of a joint mine represents its maximum capacity to produce and tender coal for shipment, it also represents its maximum capacity to make reasonable requests for cars, and hence its maximum capacity to call forth the duty of the carrier or carriers serving it under paragraph 12 of section 1.

Furthermore, while this paragraph of the law requires carriers, during periods of car shortage, to maintain and apply just and reasonable ratings of coal mines, it prescribes no formula for determining what are just and reasonable ratings. This is another matter left to the discretion and administrative judgment of the Commission. The just and reasonable rating of a mine, considered as one of the factors used in arriving at the *pro rata* share of the available cars of the mine from day to day is not necessarily the same as the capacity of the mine to load cars. The just and reasonable rating of a local mine from day to day is represented by its capacity to load cars *or by its request for cars if for a number less than its capacity to load.* The just and reasonable rating of a joint mine, when ordering cars from only one of the carriers serving it, is represented by its capacity to load cars *or by its order for cars if for a number less than its*

capacity to load. The 100 per cent rule only applies to a joint mine when ordering cars from the two carriers serving it. The effect of this rule is to make the maximum daily rating of a joint mine from each of the two carriers serving it the difference between its total capacity to load coal and the tonnage tendered by it for transportation over the other carrier. That is to say, if a joint mine having a gross daily capacity of 100 carloads of coal tenders 75 carloads to one of the two carriers serving it on a given day, its rating that day on that carrier is 75 carloads, while its maximum rating that day on the other carrier is 25 carloads. By holding that the 100 per cent rule is not in principle unjust or unreasonable the Commission in effect found that the application of the formula above described determines the just and reasonable ratings of a joint mine ordering cars from two carriers from day to day.

(*c*) The remaining section of the law (section 3, paragraph 1), alleged to have been transgressed by the 100 per cent rule, makes it unlawful for any common carrier to make or give any undue preference or advantage to any particular person, locality or description of traffic, or to subject any particular person, locality or description of traffic to undue or unreasonable prejudice or disadvantage. This section of the act does not make all preferences or prejudices unlawful; only those that are undue or unreasonable.

The 100 per cent rule in effect requires a joint mine requesting cars from more than one carrier to accompany its requests for cars with *bona fide,* concomitant tenders of sufficient capacity to load all cars ordered on the particular day for which they are desired for loading. Other rules in effect

make similar requirements of local mines and joint mines which confine their orders to a single carrier. Where is the discrimination or preference, let alone discrimination or preference of a character which could be said to be undue or unreasonable? If, as a result of the manner in which a joint mine voluntarily divides its orders for cars between the roads serving it, it receives a lesser number of cars on a given day than a local mine of the same capacity or some joint mine of the same capacity which does not split its daily orders, who is to determine whether the resulting difference in car supply is unduly preferential or unreasonably prejudicial? The Commission, of course. It was to decide such questions that the Commission was created. The law prescribes no formula for determining whether a given discrimination, preference, or prejudice in rates or car supply is due or undue, reasonable or unreasonable.

4. The questions whether a request for cars made under certain circumstances and conditions is reasonable or unreasonable; whether a rule of car distribution is just or unjust; whether a rule for determining the car-ordering ratings of joint mines tendering coal to two or more carriers from day to day results in ratings just or unjust, reasonable or unreasonable, and whether a certain prejudice or disadvantage in car supply is due or undue, are questions of fact within the administrative functions and power of the Commission to determine.

Interstate Commerce Commission v. Illinois C. R. Co., 215 U. S., 452.

Baltimore & Ohio R. Co. v. United States ex rel. Pitcairn Coal Co., 215 U. S., 481.

Morrisdale Coal Co. v. Penna. R. R. Co., 230 U. S., 304.

Pennsylvania R. Co. v. Puritan Coal Min. Co., 237 U. S., 121.

Pennsylvania R. Co. v. Clark Bros. C. M. Co., 238 U. S., 455.

Loomis v. Lehigh Valley R. Co., 240 U. S., 42.

Pennsylvania R. Co. v. Sonman S. C. Co., 242 U. S., 120.

Pennsylvania R. Co. v. Stineman Coal Min. Co., 242 U. S., 298.

Director General of Railroads v. Viscose Co., 254 U. S., 498.

Seaboard Air Line Railway Co. v. United States, 254 U. S., 57, 61.

Pennsylvania R. Co. v. United States, 236 U. S., 351, 361.

Skinner & Eddy Corp. v. United States, 249 U. S., 557, 562.

Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S., 88.

Pre-Cooling Case (*Atchison, T. & S. F. R. Co. v. United States*), 232 U. S., 199.

Los Angeles Switching Case (*Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*), 234 U. S., 194, 311-312.

Manufacturers R. Co. v. United States, 246 U. S., 457, 482.

Kansas City Southern R. Co. v. United States, 231 U. S., 423, 440.

Proctor & Gamble Co. v. United States, 225 U. S., 282, 297-298.

Interstate Commerce Commission v. Union P. R. Co., 222 U. S., 541.

Interstate Commerce Commission v. Delaware, L. & W. R. Co., 220 U. S., 235.

In the first case above cited, certain railroads assailed an order of the Commission requiring them to count company fuel cars against the distributive shares of the mines to which they were allotted. It was claimed that such a requirement would result in discrimination against the mines from which the railroads purchased their fuel coal. Answering this contention and holding that it was within the power of the Commission to prescribe car-distribution rules, the court said, at page 478:

> "At best, these arguments but suggest the complexity of the subject, and the difficulty involved in making any order which may not be amenable to the criticism that it leads to or may beget some inequality. Indeed, the arguments just stated, and others of a like character which we do not deem it essential to specially refer to, but assail the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to the violations of the statute, and to correct them if found to exist, or attack as crude or inexpedient the action of the Commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils."

In the next case, *Pitcairn case,* the question was whether the Commission or the courts could pass upon the lawfulness of car-distribution rules and prescribe new rules for the future. The rules for rating coal mines on the Baltimore & Ohio Railroad took into consideration, first, the capacity of the mines to produce coal and, second, the previous shipments by the mines for a period of two years. After the mines were so rated, there were certain deductions made from the general pool of cars. For example, cars for Baltimore & Ohio fuel coal were deducted. New mines were allotted an arbitrary number of cars for development; foreign cars for foreign railroad fuel were deducted; private cars were also deducted. There were other exceptions, one of which is peculiarly interesting here and which was referred to by the Supreme Court, page 485, as follows:

> "When mines are connected with foreign railroads as well as with the Baltimore & Ohio, their rating is reduced 50 per cent. A similar reduction is made in cases where mines are located near rivers and are equipped for loading boats."

As the quoted exception indicates, it was a rule applicable to joint mines and limited the orders of such mines on the Baltimore & Ohio to 50 per cent of their ratings. It was these rules, including the joint-mine rule, which was attacked in the court below, but the Supreme Court held (page 493) that "the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission, and not subject to be judicially enforced."

In the *Morrisdale case, supra,* a coal company sought to recover damages from the railroad company for alleged vio-

lations of Section 3 of the Interstate Commerce Act in the distribution of coal cars. At pages 312-313 the court said:

> "The prohibitions of section 3 of the Commerce Act require that cars shall be fairly allotted to shippers without unjust discrimination or unfair preference. But the statute does not define what is the proper method of distribution in case of our shortage, * * *
>
> "* * * the question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Commission. It was distinctly so ruled in the Pitcairn Case, 215 U. S., 481, and in I. C. C. *v.* Illinois Central, 215 U. S., 452. Those cases involve a consideration of the power of the Commission over the distribution of cars and held that the courts could not by mandamus compel it to make a rule, nor by injunction restrain the enforcement of one it had promulgated. If in those direct proceedings the courts could not pass upon the question of reasonbleness of a method of allotting cars neither can it do so as an incident to an action for damages.
>
> In view of the decision in the Abilene, Pitcairn and Robinson cases it is unnecessary again to discuss the statute or do more than say that in this case the plaintiff was not entitled to maintain its action without producing an order of the Commission that the rule adopted by the Pennsylvania Railroad was unreasonable."

In the *Puritan Coal Co. case, supra,* the court referred to the authority of the Commission over car-distribution rules as follows, at page 131:

> "But it must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement * * *."

In the *Clark Bros. case, supra,* the court stated at pages 468-469:

> "The question whether the rule or method of car distribution practiced by the railroad company was unjustly discriminatory was one which the Commission had authority to pass upon. Inter. Comm. Comm. *v.* Ill. Cent. R. R., 215 U. S., 452; Same *v.* Chicago & C. R. R., 215 U. S., 479; Morrisdale Coal Co. *v.* Penna. R. R., 230 U. S., 304, 313; Penna. R. R. *v.* Puritan Coal Co., 237 U. S., 121, 131. Further, by reason of the nature of the question involved in an attack upon the rule or method of the company in distributing cars, no action was maintainable in any court to recover damages alleged to have been inflicted thereby until the Commission had made its finding as to the reasonableness of the rule."

In *Director General of Railroads v. Viscose Co., supra,* this Honorable Court (by a vote of 5 to 4) went to the ap-

parently extreme limit in upholding the necessity of exclusive administrative authority of the Commission in matters of the nature here in issue. In that case, it appeared that the Director General of Railroads (the case arose during Federal Control) had amended the appropriate tariff schedules, cancelling all rates on silk and declaring that thereafter silk "will not be accepted for shipment," although such rates had been in effect and silk had been transported as freight for many years prior thereto. Without resorting to the Commission, the Viscose Company applied for and obtained a temporary, and later a permanent, injunction from a District Court, restraining the Director General from putting the amended schedule into effect and from refusing to accept silk for transportation. Upon appeal to the Circuit Court of Appeals, the question whether the District Court had any jurisdiction in the premises was certified to this court. The Viscose Company argued that for a common carrier to exclude a commodity from its tariffs and to refuse to accept it for shipment was neither classification nor regulation, but a plain violation of its common-law and statutory duty. But this Honorable Court answered the question certified in the negative, held that the exclusion of silk from the tariffs was a matter of classification the unreasonableness of which was for the Commission to determine, and reiterated——

> "The importance to the commerce of the country of the exclusive initial jurisdiction which Congress has committed to the Interstate Commerce Commission," etc.

Thus, the Commission is held to have the power and authority to approve or prescribe a rule or regulation under

which a railroad would be absolved from the duty of accepting a certain commodity for transportation. In other words, the Commission has the power to approve or prescribe a rule whereby what appellees herein denominate as a "legal and common-law right" to demand the transportation of a certain commodity is denied. With such a power, the Commission is certainly authorized to approve or prescribe the 100 per cent rule here involved. Clothed with power so to classify freight as to authorize carriers to deny the use of their facilities for the transportation of certain commodities, it is well within the limits of its authority when it approves or prescribes a rule which, falling far short of authorizing carriers to refuse to accept coal for shipment, merely lays down the conditions under which the cars available for its transportation will be divided among the shippers during periods of car shortage.

III.

Regardless of Whether the Commission's Order of December 11, 1922, was in Effect an Affirmative Prescription of the Hundred Per Cent Rule, the District Court Erred in Enjoining Either the Order or the Rule.

1. It is clear that the questions whether the 100 per cent rule was just or unjust, reasonable or unreasonable, or whether it operated to the undue prejudice of the joint-mine operators or the unreasonable advantage of the local-mine operators were administrative in character and therefore within the jurisdiction of the Commission to determine. After long drawn-out hearings and two separate oral argu-

ments, the Commission found that the 100 per cent rule was not unjust, unreasonable or unduly prejudicial to the joint-mine operators. This finding of the Commission was final and not subject to review by the District Court, unless there was some irregularity in the proceedings before the Commission, a lack of substantial evidence supporting the decision, or the Commission's action was arbitrary or transcended the legitimate bounds of its authority. *Cases cited on pages* 54-56 *hereof.*

The bill filed by complainants in the court below refers to no irregularity in the proceedings before the Commission, and makes no allegation that the decision of the Commission was unsupported by substantial evidence. And, even though the bill did contain such charges, they would constitute no ground for enjoining the Commission's order because the record and evidence upon which the Commission acted was not introduced in the court below and is therefore not part of the record in this court.

Louisiana & Pine Bluff R. Co. v. United States, 257 U. S., 114.

Edward Hines Yellow Pine Trustees v. United States, 263 U. S., 143.

It follows that the only ground upon which the District Court could properly have enjoined the Commission's order was that the action of the Commission was arbitrary and transcended the legitimate bounds of its administrative authority.

2. The bill charged and the complainants below contended that the action of the Commission was arbitrary and beyond its powers because (*a*) it was predicated upon a desire to ad-

just or equalize labor conditions between mines; (*b*) the decision and rule authorizes and requires carriers serving a joint mine to consult with each other regarding the tenders made by a joint mine; (*c*) the decision, order and 100 per cent rule are discriminatory against joint-mine shippers as compared with joint shippers of other commodities; and (*d*) the rule deprives a joint mine of its advantages of location. These charges and contentions will be considered in the foregoing order.

(*a*) The only basis for the charge that the action of the Commission was predicated upon a desire to adjust or equalize labor conditions between mines is the following words in the second report of the Commission (Record, 40):

> "There has been extreme dissatisfaction in the ranks of mine labor, accentuated, in any event, by inequalities in opportunities for working time and wages. The results of such disturbed labor conditions have been harmful to the carriers and to shippers."

The contention based upon the foregoing words is frivolous. The Commission entered no order designed or intended to equalize the running time of coal mines or to quiet labor dissatisfaction. In their petition to reopen the cases before the Commission, the joint-mine operators, appellees here, in effect conceded that the Commission did not predicate its action in dismissing the complaints and approving the 100 per cent rule upon any finding, conclusion or opinion that the running time and labor supply of joint mines or local mines should be equalized, or upon any purpose, design or intent to bring about such equalization (Record, 101, 109, 118-119). In this connection, the dissenting memorandum

of Commissioner Potter may not be referred to as indicating the ground of the Commission's action.

Interstate Commerce Commission v. Delaware, L. & W. Ry. Co., 220 U. S., 235, 251-252.

While there is nothing in the order or report of the Commission designed or intended to equalize the running time of joint mines and local mines or otherwise to quiet the dissatisfaction of mine labor usually incident to unequal running time, the Commission unquestionably has the power, indeed it is its duty, to consider circumstances affecting the welfare of the public and the parties in passing upon the question whether the discrimination or prejudice alleged to result from the rate, rule or practice complained of is undue or unreasonable.

Texas & P. Ry. Co. v. Interstate Commerce Commission, 162 U. S., 197, 219.

Interstate Commerce Commission v. Chicago, R. I. & P. R. Co., 218 U. S., 88, 103.

As the court said in the first of these two cases:

> "* * * all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers, and consumers should be considered by the tribunal appointed to carry into effect and enforce the provisions of the act."

Paragraph 1 of Section 3 of the act prohibits undue preference to one person or locality and undue prejudice to another person or locality *in any respect whatsoever*. The joint-mine operators contended before the Commission that

during periods of car shortage, when they ordered cars from two carriers, they should be allotted *pro rata* shares of the cars on the basis of ratings equivalent to 200 or 150 per cent of the actual ratings of their mines. The local-mine operators contended that, to the extent the joint mines were allotted cars on the basis of ratings in excess of 100 per cent of their actual ratings, the result was unduly preferential to the joint mines and unduly prejudicial to the local mines for the reason, among others, that the joint mines were thereby accorded such a tremendous advantage in running time that they eventually deprived the local mines of their labor supply. The running time of joint mines on the 100 per cent rule is measurably greater than that of local mines. The local-mine operators conceded before the Commission, and still concede, that the joint-mine operators are entitled to this advantage of greater running time on account of the geographic advantage of location of their mines on more than one railroad, but the joint-mine operators are not entitled to the still further and additional running time incident to the operation of the 150 per cent rule. *Nothing in the order, ruling and report of the Commission deprives, or attempts to deprive, the joint-mine operators of their advantage in running time incident to the operation of the 100 per cent rule.*

Evidence of the effect of disproportionate running time of coal mines was considered by the Commission in *Traer v. Chicago & Alton Railroad Co.*, 13 I. C. C., 451, wherein some features of the so-called assigned car practice were condemned. One of the defendant carriers undertook to enjoin the Commission's order. The Commission defended and set up in its answer to the bill the grounds upon which

its order rested. The case finally reached this court, where the order of the Commission was upheld on the ground that it was within the power of the Commission. *Interstate Commerce Com. v. Illinois C. R. Co.*, 215 U. S., 452. One of the grounds alleged in the Commission's answer and referred to in the opinion of this court was (page 407, in margin):

> "That the operator receiving the foreign railway fuel cars, private cars, or company fuel cars is enabled thereby to secure and hold a larger, more efficient and regular working force of miners and laborers."

(*b*) By Article 24 of the bill of complaint, it is alleged that the 100 per cent rule has the effect of authorizing and requiring each of two competing and independent carriers to act in combination one with the other to refuse any transportation of coal tendered to it if tendered to the other carrier, and that such "combination" is in restraint of trade and contrary to the laws of the United States and the State of West Virginia.

As it is ordinarily impossible for a mine to produce coal until railroad cars are placed under the tipple, it is impossible for it to make an actual tender of coal for shipment before the cars are received. For this reason, a constructive tender predicated on the demonstrated capacity of the mine to produce and load coal is permitted. In the nature of things, there is no way for a local mine to misrepresent the quantity of coal which it can make ready for shipment from day to day and thereby to secure more than its proper *pro rata* share of the available cars; its rating on the single carrier serving it constitutes an effective bar to any such at-

tempt. On the other hand, it is possible for a joint mine, by ordering more than its gross rating of cars from the two or more carriers serving it, to misrepresent the aggregate quantity of coal which it can make ready for shipment from day to day and thereby to secure more than its proper *pro rata* shares of the available cars during periods of car shortage.

By paragraph 4 of Section 10 of the Interstate Commerce Act (25 Stat. L., 855), it is made unlawful for a shipper by payment of money *or otherwise* to induce or attempt to induce any common carrier to unjustly discriminate in his favor as against any other shipper. To police the orders of joint mines was one of the purposes of the 100 per cent rule; it was merely the means adopted by the carriers to prevent joint mines from misrepresenting the quantity of coal which they have ready for shipment from day to day and thereby to prevent them from securing unfair advantages in car supply over local mines and joint mines which tender their coal to single carriers.

As a police regulation, the 100 per cent rule is similar in purpose and effect to numerous other police regulations maintained and enforced by carriers such as weighing and inspection bureaus, and the rules and regulations governing transit privileges at junction points between two or more carriers.

(*c*) By Article XXII of the bill of complaint, it is alleged that the decision and order of the Commission and the 100 per cent rule are discriminatory against complainants as shippers of coal "as against shippers of other classes of merchandise" located on two or more railroads. While

the allegation does not so charge, it implies that a shipper of other classes of merchandise who is located on two railroads may place orders for cars with both roads beyond his capacity to load on a given day, *i. e.*, that he may accompany his requests for cars with tenders which are partially genuine and partially fictitious and have the same consideration given to the fictitious as to the genuine tenders. The Commission has passed upon this question so far as shippers of other classes of merchandise are concerned and has uniformly held that in times of car shortage no shipper has the right to receive cars based on orders for cars in excess of his capacity to load on a given day.

California Fruit Growers Exchange v. S. P. Co., 12 I. C. C., 553.

Railroad Commission of Iowa v. C., R. I. & P. Ry. Co., 29 I. C. C., 396.

Farmers Elevator Co. v. C., M. & St. P. Ry. Co., 47 I. C. C., 475.

Tanner & Co. v. C., B. & Q. R. R. Co., 53 I. C. C., 401.

Wausau Southern Lumber Co. v. G. & S. I. R. R. Co., 64 I. C. C., 732.

In the first of these cases, the Commission declined to condemn a rule providing that, in times of car shortage, cars for the transportation of oranges shall be divided among the shippers in proportion to the quantity of fruit which they have picked and placed in the packing houses at the time of the demand for cars. In its report (page 565) the Commission referred to the rule regarding requests for coal cars and stated—

> "A mine cannot in good faith ask for more cars than it can load."

In the next three cases, the Commission approved or prescribed rules providing that, in times of car shortage, cars for the transportation of grain shall be divided *pro rata* among the shippers in accordance with the quantity of grain which they have in the elevators ready for immediate shipment. In the *Tanner case, supra,* the Commission again referred (page 406) to the rule regarding coal-car distribution, and said—

> "Coal is shipped as mined *and the amount that may be considered ready for shipment is the amount that can be mined, loaded and forwarded from day to day.*"

In the last case, the Commission held that, in times of car shortage, cars for the transportation of lumber should be divided among the mills in accordance with the quantity of stock conveniently located for prompt loading and shipment.

Furthermore, the allegation in the bill does not state who are the "shippers of other classes of merchandise," nor what commodities they ship, nor what kind of cars they use, nor whether they compete with complainants (appellees here) and other shippers of coal for trade or cars. The Commission has held that in the absence of competition there can be no discrimination which is prohibited by the Act.

Board of Trade of Chicago v. A., T. & S. F. Ry. C., 29 I. C. C., 438, 443.

Portsmouth Association of Commerce v. S. A. L. Ry. Co., 55 I. C. C., 377, 380.

And no issue of discrimination as between shippers of coal, on the one hand, and "shippers of other classes of merchandise," on the other, was presented in the complaints filed with the Commission.

(*d*) Lastly, it is insisted that the effect of the operation of the 100 per cent rule is to deprive joint mines of their advantage of location on two railroads. This appears to be the basis of the decision below. Note the following language of the court (Record, 128, herein):

> The shipper of any commodity who has access to more than one carrier has a right to choose one carrier, or to divide his goods among two or more carriers, with the advantages naturally belonging to such location, giving such access; and while the Interstate Commerce Commission has, under the law, certain powers of regulation, yet it is beyond such powers to deprive the shipper of such right, under the guise of regulation, or to limit such right in such way as to amount to the deprivation thereof.
>
> * * * * * * *
>
> A so-called regulation which destroys at least thirty per cent of the market value of a coal property, certainly transcends such authority. It is a taking of private property without due process of law, by depriving the owner of the power to use it in a legitimate and proper way, for the commercial purpose for which it was designed and developed, etc.

But neither of the rights of a joint-mine shipper, referred to in the first sentence of the foregoing findings of the court below, is negatived by the 100 per cent rule. Indeed, each of those rights is fully protected by the 100 per cent rule.

Under this rule, a joint-mine operator is not deprived of his right "to choose one carrier, or to divide his goods among two or more carriers." Under this rule, a joint-mine operator may tender the entire output of his mine to any of the carriers serving it; he may tender it to the particular carrier having the greatest car supply from day to day and in that way secure for his mine more cars in the aggregate during a given period than a local mine of the same rating on either road. In other words, he may "switch" his orders back and forth between the carriers serving his mine, picking and choosing the particular carrier likely to have the best car supply from day to day. So, too, he may "split" his tender between the two or more roads serving his mine in any manner he may choose. There is nothing in the 100 per cent rule which deprives joint-mine operators of these rights.

Furthermore, there is nothing in the rule which deprives joint-mine operators of the right at any time to ship their coal to markets on either or all of the carriers serving their mines. There is nothing in the rule to prevent them at any time from routing their coal via the carrier with the lowest rates or the best service.

That the 100 per cent rule does not deprive joint mines of their advantages of location, but in fact accords them such advantages, was clearly shown before the Commission and appears in the record of the case in this court. In the first report of the Commission (record, 29, herein), it was found (as set out in statement form at record, page 92, herein) that during the month of August, 1920, *when the 100 per cent rule was in effect,* the joint mines of the New River Company, appellees here, received a 9.7 per cent better car supply

on the average than did local mines with like ratings on the same roads serving the joint mines.

Furthermore, *since the promulgation of the 100 per cent rule,* numerous complaints have been filed with the Commission by local mine operators to compel the railroads to treat their mines as joint mines in order to secure the very advantages which appellees here claim are negatived by the 100 per cent rule. These complaints have been determined. (See Record, 117, herein.)

Ridge Coal Mining Co. v. M. P. R. R. Co., 62 I. C. C., 259.

Dering Mines Co. v. Director General, 62 I. C. C., 265.

Hillsboro Coal Co. v. C., C. C. & St. L. Ry. Co., 63 I. C. C., 401.

Benton Coal Mining Co. v. C., B. & Q. R. R. Co., 63 I. C. C., 396.

Franklin County Mining Co. v. C., B. & Q. R. R. Co., 63 I. C. C., 396.

Cameron Coal Co. v. M. & E. R. R. Co., 63 I. C. C., 434.

In the first named of these cases the Commission specifically found that—

> Joint mines are treated by carriers in the matter of car supply and other transportation services, the same as mines physically located on more than one railroad. Thus in times of car shortage a joint mine may draw cars from each of the railroads to which the mine is joint, whereas a local mine is limited in its supply to the only line serving it. * * *
>
> *"The record establishes that a joint or junction*

point mine has a decided advantage over a local mine in the matter of car supply as well as in other respects." (Italics mine.)

In the *Dering Mines Company case, supra,* the Commission found that—

> "The advantages which would accrue to the complainants if they should prevail would be a better car supply in times of car shortage, due to the opportunity they would then have to draw cars from both lines; an additional route to Chicago and other points reached by both lines; and access by each mine to local markets on both lines instead of only the local markets on its one line as at present. * * * The benefit chiefly sought by complainants, however, is better car supply to the joint mine in times of car shortage. *The record shows that the joint mine has an advantage in this respect.*" (Italics mine.)

And in its second report of the case, which led to the present litigation, the Commission found (record, 36, herein) that—

> "Certain joint mines in Illinois and Indiana have expended large sums of money to secure connections with more than one road"—

although the 100 per cent rule was then, and still is, in effect in those States. The Commission found further (record, 36, herein):

> "It is admitted by all that the joint mine enjoys advantages not possessed by the local mine, and has the right to so place its orders as to void, if it can, embargoes and congestion of traffic on particular

> roads. It has available a more extensive and more varied market for its coal. It may at times be able to dispose of its product upon the second line of railroad, while the mine local to the first road is unable to market its output. In case of car shortage the joint mine is able to select the outlet which affords the best and most liberal means of transportation. These are important advantages to which the joint mine is entitled and in the reasonable enjoyment of which it should be protected."

But the joint-mine operators (appellees here) contended before the Commission and in the court below that, when they enter into contracts to ship coal to consumers located on a railroad having a poor car supply, the 100 per cent rule deprives them of their advantages of location on two railroads. In such case, a joint mine may secure a lesser number of cars in the aggregate than a local mine of the same rating on a road of greater car supply. But such result is not the result of the operation of the 100 per cent rule; the rule does not require a joint mine to order 100 or any other specified per cent of its cars from any particular road, much less the road of poor car supply. The result is the natural consequence of the joint-mine operator's voluntary act of choice in disposing of his coal (perhaps at a better price) to a consumer on a road of poor car supply. In other words, the joint-mine operator's own voluntary act, not the 100 per cent rule, is the proximate cause of the resulting poor car supply of his mine. As the Commission said in its second report in the case which culminated in this litigation (Record, 36-37):

> "Whenever the joint mine orders cars from the different carriers serving it, it is doubtless due to other compensating advantages which outweigh those of a temporary greater car supply, *and such election is the voluntary choice of the shipper.*" (Italics mine.)

In *Rice v. Louisville & Nashville R. R. Co.*, 1 Int. Com. Rep., 722, 738, the Commission was called upon to decide whether it was unduly prejudicial for carriers to charge the same rates on oil in barrels as on oil in tank cars, *i. e.*, to charge the shippers of oil in barrels for the transportation of the barrels, and not to charge shippers of oil in tank cars for the movement of the tanks. Chairman Cooley, who was to the Interstate Commerce Act what Chief Justice Marshall was to the Constitution, said:

> "This assumption makes the resort to the one method of transportation rather than the other a matter purely of voluntary choice on the part of the shipper, and if the argument is correct in further assuming that the two methods are equally open to all who usually engage in the business, it may justly be urged with very great force that the party resorting to the one is by the choice itself precluded from raising any question of relative reasonableness by comparing the rates he chose with the lesser rate he might have chosen, but did not."

Later the same question came before the Commission again in the case of *Independent Refiners' Asso. v. Western New York & P. R. Co.*, 4 Int. Com. Rep., 162. In this case the complaint was directed against the discrimination in rates and facilities from the Pennsylvania oil fields to New Jersey tide-water ports, and especially to Perth Amboy. It ap-

peared that the complainant shippers shipped their oil in barrels for the reason that the trade to which they sold their product demanded that it be so shipped. However, they complained to the Commission, and the Commission apparently sustained the contention, that although they had elected to ship their oil in barrels, the transportation in tank cars was not open to them impartially. The Commission ordered defendants to cease and desist from charging any rates for the transportation of the barrels or upon reasonable notice to furnish tank cars to complainants, and awarded reparation on past shipments in barrels. The defendants declined to obey the order or to pay the reparation. Suit to recover the reparation was instituted and the case finally reached the Supreme Court, which affirmed the decree of the Circuit Court of Appeals reversing the judgment of reparation granted by the court below. *Penn Refining Co. v. Western N. Y. & P. R. Co.*, 208 U. S., 208, 220-221. Among other things the Supreme Court said:

> "It is, therefore, apparent that the failure of plaintiffs to use tank cars during substantially all the period covered by the reparation order was not owing to a refusal or omission of the defendants to supply them on demand, but because they, the plaintiffs, did not demand and could not use them economically for the transportation of oil to Perth Amboy. The opinion of the Commission must be read with reference to this evidence, which, although given on the trial before the court, states the facts existing at Perth Amboy, during the time of investigation by the Commission.
>
> If it be assumed that it was the duty of the railroads to furnish tank cars to those who demanded them while the railroads continued to hire that kind

of car from owners in which to carry their oil, yet the failure to furnish them to a party that did not desire and had not demanded them certainly ought not to render it necessary for the railroads to carry the barrel package free because no charge was made for the tank package. The Commission said it may be conceded that the amount of paying freight was materially greater in tank than in barrel shipments, and that the tank car, after adding the gross weight of the car and oil, pays slightly more to the carrier per ton than the stock car with its full load of oil barrels. Nevertheless, it was stated that the facts already adverted to make out a case of unjust discrimination between the tank and a barrel shipper, and it was so adjudged in this case, where a shipper did not use or demand a tank car.

We are unable to concur in this view. Because circumstances existed which prevented the economical use of the tank car by plaintiffs (no demand being made for the use of a tank car) is no ground for finding discrimination in the charge for the weight of the barrel package (such charge being in itself not an unreasonable one) while none is made for the tank containing the oil. It might be different if plaintiffs desired tank cars and defendants failed to provide them on demand."

The foregoing decision of this Court is peculiarly applicable to the example of a joint-mine operator who orders all or the major portion of his cars from the line having the poorest car supply. The right to order all or the major portion of his cars from the line having the greatest car supply is open to him but, if he chooses not to exercise it, he can no more complain of the result of his failure than the shipper of oil in barrels could complain of the result of his failure to

order tank cars. In both cases the discrimination in car supply is the direct result of the voluntary acts of the shippers. This Court said, in *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S., 43, 46, that—

> "The law does not attempt to equalize fortune, opportunities, or abilities."

It is apparent from these considerations that the court below erred in assuming that the 100 per cent rule deprived joint mines of any of their rights or advantages of location on two or more railroads. It is respectfully submitted that the majority decision of the District Court for the Middle District of Pennsylvania in *Pennsylvania R. R. Co. v. United States*, — Fed., —, cited by the court below in the present case, has no application to the issue here involved. There, the issue was whether it was unlawful for certain railroads to maintain reciprocal trackage arrangements in one section of York, Pa. (thus giving the industrial plants located therein on a single railroad a joint status on two railroads), while contemporaneously refusing to maintain similar arrangements in other and competing sections of the same city; here the issue is the legality of a car-distribution rule applicable to mines as to whose joint status no question is raised. In the *York case* no rule, regulation or practice applicable to the industries within the favored zone was in issue; here that is the only question involved.

IV.

The Action of the District Court in Substituting its Judgment for that of the Commission has Created Discriminatory Situations Wholly Incompatible with the Interstate Commerce Act.

1. The order of December 11, 1922, was entered by the Commission in its dockets numbered 12362 and 12399, collectively known as the *Bell & Zoller Coal Co. case,* and its dockets 12081, 12082, 12083 and 12084, collectively known as the *Fairmont & Cleveland Coal Co. case* (Record, 41). The following railroads were defendants in the first two numbered dockets (Record, 68):

Baltimore & Ohio Southwestern Railroad,
Chicago, Peoria & St. Louis Railroad,
Cincinnati, Indianapolis & Western Railroad,
Chicago & Eastern Illinois Railroad,
Chicago & Northwestern Railway,
Chicago, Burlington & Quincy Railroad,
Chicago & Alton Railroad,
Chicago, Indianapolis & Louisville Railway,
Chicago, Terre Haute & Southeastern Railway,
Cleveland, Cincinnati, Chicago & St. Louis Railway,
Illinois Central Railroad,
Louisville & Nashville Railroad,
Missouri Pacific Railroad,
Pittsburgh, Cincinnati, Chicago & St. Louis Railway,
Southern Railway,

and the following railroads in the last four numbered dockets (Record, 41):

Baltimore & Ohio Railroad,
Monongahela Railway,
Virginian Railway,
Chesapeake & Ohio Railway.

The first decision of the Commission in the *Fairmont & Cleveland Coal Co. case* did not apply to the railroads defendants in the *Bell & Zoller Coal Company case,* nor to any other railroads except the last four above named. As the application to change the 100 per cent rule of the railroads defendants in the *Bell & Zoller Coal Company case* was denied by the Commission, it may be presumed that those railroads have continued to maintain and apply the 100 per cent rule. Of the four railroads defendants in the *Fairmont & Cleveland Coal Co. case* the Baltimore & Ohio and Monongahela restored the 100 per cent rule on December 11, 1922, and January 4, 1923, respectively (Record, 71). The Virginian Railway and the Chesapeake & Ohio were enjoined from restoring it by the order and decree of the court below in this proceeding.

Thus, while the decision and order of the Commission found that the 100 per cent rule was not unjust and unreasonable or unduly prejudicial on the 19 railroads defendants in all of these cases and whose lines run from the Atlantic Seaboard to the Rocky Mountains, the court below has substituted its judgment for the judgment of the Commission in respect to the rule in so far as it is applicable on two of these roads.

This Court will take judicial notice of the fact that the Virginian and the Chesapeake & Ohio operate lines to Hamp-

ton Roads, that the Baltimore & Ohio operates lines to Baltimore, Philadelphia and New York, and that the coals produced along all three of these roads compete in the export trade and in coastwise movement to New England markets. This Court will also take judicial notice of the fact that the Chesapeake & Ohio and Baltimore & Ohio and their connections operate lines to points in Ohio, Michigan, Indiana and Illinois and that the railways which were defendants in the *Bell & Zoller Coal Co. case* also operate lines in those States, and that the coals produced along all these roads compete in common markets, especially in what is known as the central competitive field north of the Ohio River. In any event, this Court will take judicial notice of reports of the Interstate Commerce Commission to the foregoing effect. *Bituminous Coal to C. F. A. Territory,* 46 I. C. C., 56; *Lake Cargo Coal Rates,* 46 I. C. C., 159.

2. The action of the court below in substituting its judgment for the judgment of the Commission has therefore created this anomalous situation. Two railroads operating in West Virginia have been enjoined by the court below from establishing and enforcing a rule of coal-car distribution which 17 other and competing railroads in the same and other States are maintaining and applying pursuant to a ruling and decision of the Commission declining to change it. There is thus presented a direct conflict of view and authority between the courts and the Commission in respect to the propriety and reasonableness of a rule of coal-car distribution, and the rule involved is clearly one as to which uniformity of administrative action is necessary.

The situation created by the action of the court below in substituting its judgment for that of the Commission is strik-

ingly similar to that used by this Honorable Court in the *Pitcairn case, supra,* to illustrate the impossibility of reconciling the spirit and purpose of the Interstate Commerce Act with interference by the courts with the administrative functions of the tribunal delegated to enforce that act. As hereinbefore indicated, coal-car distribution rules, including the rule applicable to joint mines, was the subject-matter of the litigation in the *Pitcairn case.* At pages 494, 495 of its decision in that case this Honorable Court said:

> "Under these circumstances it is apparent, as we have said, that these amendments add to the cogency of the reasoning which led to the conclusion in the Abilene Case, that the primary interference of the courts with the administrative functions of the Commission was wholly incompatible with the act to regulate commerce. This result is easily illustrated. A particular regulation of a carrier engaged in interstate commerce is assailed in the courts as unjustly preferential and discriminatory. Upon the facts found, the complaint is declared to be well founded. The administrative powers of the Commission are invoked concerning a regulation of like character upon a similar complaint. The Commission finds, from the evidence before it, that the regulation is not unjustly discriminatory. Which would prevail? If both, then discrimination and preference would result from the very prevalence of the two methods of procedure. If, on the contrary, the Commission was bound to follow the previous action of the courts, then it is apparent that its power to perform its administrative functions would be curtailed, if not destroyed. On the other hand, if the action of the Commission were to prevail, then the function exercised by the court would not have been judicial in

character, since its final conclusion would be susceptible of being set aside by the action of a mere administrative body. That these illustrations are not imaginary is established not only by this record, but by the record in the case of the Illinois C. R. Co. *v.* Interstate Commerce Commission.

We say this record, because, as has been pointed out, one of the questions which we would be called upon to decide if the merits were open is whether the court below was right in holding that if anything but the physical capacity of a mine was taken into consideration by a railroad company in rating the mine for car distribution in time of car shortage, the act to regulate commerce would be violated, and therefore the system adopted by the Baltimore & Ohio Railroad Company was repugnant to the act, because it made not alone the physical capacity, but past shipments, factors to be considered. But the reports of the Interstate Commerce Commission show that, on a complaint made to that body on the subject of the system of mine rating of the Baltimore & Ohio Railroad Company, the Commission, before the decision of the Circuit Court of Appeals in this case was announced, had expressly refused to hold that the system was either preferential or prejudicial within the act to regulate commerce."

3. Another anomaly created by the action of the court below is this: The Commission decided that the 100 per cent rule, which limits the orders of a joint mine whether addressed to one or more of the carriers serving it to 100 per cent of its gross daily rating, is not unreasonable or unduly prejudicial. The joint-mine operators, appellees here, appealed to the District Court for the Southern District of West Virginia and claimed that the 100 per cent rule in-

vaded their legal and constitutional rights in that under that rule a joint mine is not permitted to order 100 per cent of its gross daily rating from one carrier on Monday for loading on Tuesday, acquire "credit" for such order, and then order from the other carrier on Monday the difference between the number of cars ordered from the first carrier on Monday and the number actually furnished by that carrier on Tuesday. This is not the so-called 150 per cent rule—it is a rule that has never been in effect on any road at any time so far as the record shows. The District Court, without defining the "rights" of the complainant joint-mine operators in the premises, found that the 100 per cent rule contravened those undefined and unexplained "rights" and enjoined the rule. The Chesapeake & Ohio and Virginian, the railway defendants below, thereupon established *the 150 per cent rule.* Thus, it has come to pass that the railroads in southern West Virginia, enjoined from maintaining the rule in effect on competing railroads, have established a rule which was not contended for by the complainant joint-mine operators and which, for all the opinion of the court below shows, is more than they are entitled to.

And, as a result, the local-mine operators in southern West Virginia are compelled to compete with joint-mine operators privileged to receive *pro rata* shares of the available cars on the basis of 150 per cent of the gross daily ratings of their mines, while the local-mine operators in northern West Virginia, Illinois, and Indiana compete with joint-mine operators whose orders for cars are limited to 100 per cent of their mine ratings. In other words, the car supply of the southern West Virginia local-mine operators is being depleted by the operation of a rule supposed to approximate

the ideas of reasonableness of the District Court, while that of the local-mine operators of northern West Virginia and other districts is being maintained at a level representing the ideas of reasonableness held by the Commission.

V.

The Commission's Order of December 11, 1922, Dismissing the Complaints of the Complainants Below was a Mere Denial of Affirmative Relief Sought in Respect to a Question Within the Authority and Jurisdiction of the Commission and Not Subject to Review by the District Court.

1. The complaints filed with the Commission attacked the 100 per cent rule as unjust and unreasonable in violation of Section 1 and unduly prejudicial in violation of Section 3 of the Interstate Commerce Act. The sole issue before the Commission was therefore the reasonableness and propriety of the 100 per cent rule, and no other rule.

In the first decision, a division composed of three members of the Commission decided the foregoing issue in favor of the complainants, found that the 100 per cent rule was unreasonable and unduly prejudicial to joint mines and unduly preferential to local mines, and held that in the future the defendant carriers should furnish cars to joint mines in accordance with the 150 per cent rule. No order was entered requiring the carriers to establish and put in force the 150 per cent rule, but the division of the Commission concluded its report with these words:

> "We shall expect, however, that the defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies with us."

The two railway defendants promptly established and put in force the 150 per cent rule. Thereupon, the intervening local-mine operators petitioned for reargument, reconsideration and consolidation of the *Fairmont & Cleveland Coal Company cases* with the *Bell & Zoller Coal Company cases.* This petition was granted. It is the practice of the Commission that, when a case which has been decided by a division is reopened for further consideration, the full Commission will take part in the reconsideration. This practice was followed in the case which gave rise to this litigation. After reargument and reconsideration, the full Commission (one member dissenting) held thus in the second report:

> "The present facts considered, we do not conclude upon these records that the rule atacked, Rule 4 of Circular CS-31 Revised, is in principle unreasonable or unduly prejudicial. Our former conclusions in the Fairmont Cases, based upon a mistaken adherence to and extension of the decision in the Illinois cases are reversed."

and entered the order of December 11, 1922. This order was entered not only in the *Fairmont & Cleveland Coal Company cases, but also in the Bell & Zoller Coal Company cases,* and dismissed the complaints in all of the cases. In other words, the same order of dismissal was entered in the *Fairmont & Cleveland Coal Company cases,* although the 150 per cent rule was then in effect on the lines of the de-

fendants in those cases, as was entered in the *Bell & Zoller Coal Company cases*, the defendants in which were still maintaining and applying the 100 per cent rule.

2. Under the circumstances, the final order by the full Commission was a negative order, a mere denial of affirmative relief sought, and not within the jurisdiction of the District Court to review or enjoin.

Proctor & Gamble v. the United States, 225 U. S., 282.
Hooper v. Knapp, 225 U. S., 302.
Lehigh Valley Railroad Co. v. United States, 243 U. S., 412.
B. & O. R. R. Co. et al. v. United States et al., decided March 3, 1924.

In the *Proctor & Gamble case, supra*, this Court was called upon to review the action of the Commerce Court in taking jurisdiction of the case brought by the Proctor & Gamble Company to set aside and annul the order entered by the Commission dismissing the complaint which the Proctor & Gamble Company had filed attacking the practice followed by the railroads in charging demurrage on the private cars of the Proctor & Gamble Company while standing on its private industry tracks. The Commerce Court entertained jurisdiction, but dismissed the bill on the merits. But upon appeal this Court held that, as the order of the Commission was merely a negative order, it was not subject to review by the Commerce Court. This conclusion was reached upon a consideration not only of the specific language of the act giving the Commerce Court jurisdiction in certain cases, but also of the spirit and purpose of that act as part of the regu-

lating machinery. In other words, the Court proceeded to demonstrate—

> "that to give to the statute a meaning contrary to that which we have found results from its text, and therefore to recognize the existence in the Court below of the power which it deemed it possessed, would result in frustrating legislative public policy which led to the adoption of the Act to Regulate Commerce, would render impossible a resort to the remedies which the statute was enacted to afford, would multiply the evils which the Act to Regulate Commerce was adopted to prevent, and thus bring about disaster by creating confusion and conflict where clearness and unity of action were contemplated."

Speaking of its action in the three cases first above cited, this court said in *B. & O. R. R. Co., et al. v. United States et al., supra:*

> "This court declined to interfere, because to do so would have involved exercise by it of the administrative functions of granting relief which the Commission, in the exercise of its jurisdiction, had denied."

3. But it is insisted that the order here in issue, while negative in form, is affirmative in substance. The only basis for this contention is that the second report of the Commission, which was made part of the order, reversed the prior finding that the 100 per cent rule was unjust, unreasonable and unduly prejudicial, and held that the 100 per cent rule is not unjust, unreasonable or unduly prejudicial. Putting aside the fact that the first report was by a division of three members of the Commission while the second report was by

the full Commission, there are several answers to the contention.

In the first place, as hereinbefore explained, the order of December 11, 1922, was entered not only in the *Fairmont & Cleveland Coal Company cases,* but also in the *Bell & Zoller Coal Company cases.* That is to say, identically the same order was entered in all these cases. The order of December 11, 1922, was the only order entered in the *Bell & Zoller Coal Company cases.* There was no previous finding by the full Commission or by a division of the Commission in the *Bell & Zoller Coal Company cases* that the 100 per cent rule was unreasonable or unduly prejudicial or otherwise in contravention of the act. Obviously, therefore, there would be no basis whatsoever for a contention that, considered as an order entered in the *Bell & Zoller Coal Company cases,* the order of December 11, 1922, was an affirmative order in any way, shape or form. Inasmuch as the *Fairmont & Cleveland Coal Company cases* and the *Bell & Zoller Coal Company cases* were consolidated, one report made in all the cases, and identically the same order entered in each and all of them, it must follow that the order of December 11, 1922, was quite as much negative in character and a denial of the affirmative relief sought in the *Fairmont & Cleveland Coal Company cases* as in the *Bell & Zoller Coal Company cases.* Surely, the mere circumstance that the *Fairmont & Cleveland Coal Company cases* passed through one additional stage of procedure before the Commission does not alter the essential characteristics of the order entered. It does not make different what is in fact the same.

Furthermore, the second report by the full Commission must be regarded as a continuation of the proceeding in-

cident to the first report by a division of the Commission. The first report by a division of the Commission was not a final determination of the question presented in the *Fairmont & Cleveland Coal Company cases.* The 100 per cent rule was in effect when the complaints in both sets of cases were filed and, as the Commission reached the final conclusion that that rule is not unreasonable or unduly prejudicial, and as that conclusion referred back to the matters complained of in the complaints and operated upon conditions as they existed when those complaints were filed, the Commission merely dismissed the complaints. In other words, the burden of proof to substantiate the allegations of the complaint was upon the complainants. The complainants failed to sustain the burden, so the Commission dismissed their complaints. As Circuit Judge Woods said in his dissenting opinion below (Record, 131):

> "There was never any order, or even final determination of the Commission to put into effect any rule or to interfere with Rule 4 (the 100 per cent rule) of the railroads. The conclusions announced in its opinion were reopened, reconsidered and changed; but all this was done in one consolidated proceeding, which was never ended until the Commission made the order above quoted. This last order was a final dismissal of the complaints and a refusal to take any action with respect to Rule 4 of the railroads. It was, therefore, a negative order—a mere refusal to interfere with an existing rule. As such it was not reviewable by this court."

In this connection, the action of the Commission in the *Proctor & Gamble case,* which this court held was not sub-

ject to review, had more the semblance of affirmative action than the report and order of the Commission involved in the present proceeding. In its decision in the *Proctor & Gamble Company case,* which is reported at 19 I. C. C., 556, the Commission clearly indicated that the failure of the roads to charge demurrage on private cars while standing on the owner's private track would be unjustly discriminatory and therefore unlawful. For example, on page 588 of its report, the Commission said:

> *"Surely any arrangement for the use of private cars which causes, or results in, undue preference or unjust discrimination, is repugnant to the underlying principle, as well as in conflict with the terms, of the act."*

And on page 560:

> "Complainant goes further than to assert its right to be relieved from demurrage on its own cars, when standing upon its own tracks within its own works, and asserts that a privately owned car while standing upon a privately owned track should be free from demurrage, even though the car were owned by one private interest and the track by another private interest. In other words, that owners of private tracks and owners of private cars should be permitted to exchange courtesies, and by mutual consent to relieve cars from the demurrage rules of the carriers. *It seems obvious that the acceptance and application of that theory would involve all of the elements of undue preference and unjust discrimination."* (Emphasis mine.)

Bear in mind that the order entered by the Commission in the *Proctor & Gamble case* merely dismissed the com-

plaint; it did not require the defendant railways to continue charging demurrage on private cars while standing on the owner's private tracks. But the foregoing quotations from the Commission's report certainly indicate that the Commission expected the defendant railways to continue charging such demurrage, and to that extent the order, in the light of the report, might have been considered affirmative in substance. Indeed, this court said (page 287) in its decision that the Commission in dismissing the complaint "made a report declaring that the rules complained of were in no sense in conflict with the act to regulate commerce and, on the contrary, *conform to that act and tend to prevent and repress unlawful preference and discrimination.*"

4. It is interesting to note that the answers filed by the railway defendants to the bill of complaint herein expressly averred that the fear of being subjected to the penalties of the law for violating an affirmative order of the Commission was NOT the reason why they re-established the 100 per cent rule following the decision of the Commission. For example, the answer of the Chesapeake & Ohio Railway expressly states that the fear of damage suits for maintaining the 150 per cent rule was the reason why that railroad reestablished the 100 per cent rule.

In *Lehigh Valley R. R. Co. v. United States, supra,* it appeared that the appellant railroad had petitioned the Commission for permission to continue the ownership and operation of a boat line. Such ownership and operation was made unlawful by the so-called Panama Canal act after a certain date unless authority for continued ownership and operation was obtained from the Commission. The act pro-

vided heavy penalties for railroads owning and operating boat lines without such authority of the Commission. The Commission denied the authority and entered an order dismissing the petition of the railroad. The effect of this order of dismissal was to require the petitioning railroad to dispose of its boat line and the contention was therefore made that the order, while negative in form, was affirmative in substance. But the Supreme Court said, at page 414:

> "The order of the Commission was negative in substance as well as in form. *Proctor & Gamble Co. v. United States,* 225 U. S., 282, 292, 293; 56 L. Ed., 1901, 1095; 32 Sup. Ct. Rep., 761. The risk to which the railroad was left subject did not come from the order, but from the above-mentioned section of the Panama Canal act, amending Sec. 5 of the Act to Regulate Commerce (24 Stat. at L., 380; chap. 104, Comp. Stat. 1913, sec. 8567), making each day of violation a separate offense, and the provision of the latter act, Sec. 10, which imposes a possibly large fine. This risk is the same that it was before the order, or that it would have been if appellant had not applied to the Commission, except so far as the findings establish facts that we believe there is no desire to dispute."

The foregoing decision of the Supreme Court is a conclusive answer to the contention that the order here in question is affirmative in substance. The defendant railways herein would be subject to suits for damages for maintaining the 150 per cent rule even though the Commission had never been asked to pass upon the 100 per cent rule.

5. But it is contended that by its decision in the *Proctor & Gamble case* this Court merely intended to hold that the courts have no authority to review a negative order of the Commission in respect to an administrative question only. It is insisted that where, as here, it is alleged that the order of the Commission has the effect of depriving the complainant shippers of their legal or constitutional rights, the courts have jurisdiction. Precisely the same contention was made in the *Proctor & Gamble Company case*. In order to make clear the theory upon which the bill of complaint in that case was based, this court copied the pertinent allegation of the bill in the margin of its decision (page 287). This allegation was as follows:

> "Complainant avers that said order of said Interstate Commerce Commission, in dismissing its complaint as above set forth, is null and void and beyond the power of said Interstate Commerce Commission, in that it sustains the validity of rule 1 of said demurrage; that said rule 1, so far as it provides that privately owned cars under lading on private tracks are in railroad service and subject to the demurrage charges imposed by said tariffs until the lading is removed, is unjust and unreasonable, in that it deprives complainant of the right to use its said private cars upon private tracks for its own purposes without paying the defendant railway companies demurrage charges therefor, after said private cars have been delivered to complainant, and have actually ceased to be engaged in railroad service; that the charges exacted by the defendant railway companies of complainant under said provision of said rule permit said defendants to take complainant's property without compensation, and deprive it of its property without

due process of law, in violation of the Constitution of the United States, and particularly of article 5 in amendment thereof, and that said provision of said rule is in violation of the said act to regulate commerce, and particularly of Sections 1 and 15 thereof, as amended June 29, 1906 (34 Stat. at L., 584, 589; chap. 3591, U. S. Comp. Stat., Supp. 1911, pp. 1284, 1297); that said defendants are now exacting such demurrage charges under the provisions of said rule, and will continue to do so, unless the said order of said Interstate Commerce Commission is set aside and annulled by this court, and defendant railway companies are enjoined from enforcing the provisions of said rule."

It is thus seen that the plaintiff in the *Proctor & Gamble Company case* claimed that its property was being taken without due process of law; in other words, its bill of complaint was quite as broad as the one involved here. On this question this Court said (page 301):

"Some suggestion is made in argument concerning the alleged claim of constitutional right asserted in the petition filed below, and which the court disposed of in the manner we have stated. But what we have said suffices to point out the fallacy which the contention involves, for the following reasons: If the claim of constitutional right concerned a subject which, from its very nature and effect, dominated the act to regulate commerce, and therefore was wholly independent of all questions of right or remedy created by or depending upon that statute, then the issue presented a controversy not cognizable in the Commerce Court, as it could not so be without violating the express reservation and restriction as to the general power of the circuit courts which we

have just quoted. *If, on the other hand, the constitutional question was involved in or depended upon the provisions of the act to regulate commerce, that question, in the nature of things, was subject to the precedent action of the Commission on the subjects committed to it by the act to regulate commerce, and as to which the court had jurisdiction alone to act, in virtue of a prior affirmative order of the Commission.*" (Italics mine.)

Conclusion.

It is respectfully submitted that the 100 per cent rule does not deprive joint mines of any legal right or relieve railroads of any common carrier obligation or duty either at common law or under the Interstate Commerce Act; that, if it is not required by express provisions of the Act, it is within the administrative functions of the Commission to prescribe or approve; that regardless of whether the order of the Commission of December 11, 1922, was in effect an affirmative prescription of the 100 per cent rule, the District Court erred in enjoining the order or the rule; and that the order of December 11, 1922 was in fact a mere negative order—a mere denial of affirmative relief sought—in respect to a question within the jurisdiction of the Commission, and not subject to review by the District Court.

The judgment and decree of the District Court should be reversed.

GEORGE T. BELL,
Solicitor for Appellants in No. 628.

WASHINGTON, D. C., March 22, 1924.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1923.

No. 627
UNITED STATES OF AMERICA *et al., Appellants,*
v.
THE NEW RIVER COMPANY *et al., Appellees.*

No. 628
SLAB FORK COAL COMPANY *et al., Appellants,*
v.
THE NEW RIVER COMPANY *et al., Appellees.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

BRIEF FOR APPELLEES IN NO. 627 AND NO. 628

STATEMENT OF THE CASE.

This is an appeal from a decree in favor of the appellees, The New River Company et al., granting them injunctive relief against an alleged denial to them of legal rights to transportation by The Chesapeake & Ohio Railway Company and The Virginian Railway Company through the promulgation of a rule as to

the furnishing of cars for transportation, known as Rule 4. As this rule was promulgated by the railroads solely in compliance with and pursuant to a decision and order of the Interstate Commerce Commission, the complainants joined as respondents the United States of America and the Interstate Commerce Commission and requested the assembling of a three judge court for the hearing of the cause under the provisions of Act of Oct. 22, 1913, c. 32 (38 Stat. 220; Compiled Stats., §998).

The complainants alleged in their bill (Rec., p. 11,* Section XV of the bill) that

> "Acting under and because of said decision, order and ruling of the Commission of December 11, 1922, and as your complainants are informed and believe and therefore allege, in fear and duress of the penalties imposed by law in case of violation of any decisions, orders or rulings which the Commission is authorized to make, the carriers, defendant herein, have put in force, and notified your complainants that they have put in force Rule 4 of Circular CS-31 Revised, effective in the case of The Chesapeake and Ohio Railway Company on February 10, 1923, and in the case of The Virginian Railway Company on February 1, 1923."

and the railway defendants, The Chesapeake & Ohio Railway Company and The Virginian Railway Company, respectively, set forth in their answers (Rec., p. 54 and p. 49);

In the Chesapeake & Ohio answer (Rec., p. 54):

* Page reference herein, unless otherwise specified, is to the printed record in Case 628.

"The orders issued by the Commission in the cases of New River Company et al. v. the 'Chesapeake' and 'Virginian,' supra, expressly made the report containing findings of fact and conclusions thereon a part thereof, and while negative in form was necessarily treated by respondent as affirmative in substance and character. The decision in the Bell & Zoller case, supra, which was expressly made part of the order, did two things, first, it condemned the Illinois rule as published by respondent, and, second, it approved Rule 4 of Circular C. S.-31 (Revised). Because of the reparation provisions of the Interstate Commerce Act, the effect upon respondent of the order was necessarily precisely the same as though the order had been in the affirmative form, requiring respondents to cease and desist publishing and observing the Illinois rule and in lieu thereof to publish and observe Rule 4 of Circular C. S.-31 (Revised).

"Facing as it did the danger of having to successfully defend suits for heavy damages, believed to approximate as much as $5,000.00 per day, supported by a decision and by reparation orders of the Commission, which it is believed would have automatically followed the failure of respondent to have observed the rule prescribed by the Commission in the Bell & Zoller case, supra. Respondent, after due notice to complainant, undertook to cancel the joint mine rule published in Supplement No. 1 to Circular C. S.-31 (Revised) through the issuance of Supplement No. 3 to Circular C. S.-31 (Revised), effective February 10, 1923, copy of which is attached, marked "Appendix No. 2," thereby on that date undertaking to restore Rule 4 as published in Circular C. S.-31 (Revised), as shown in Appendix A of 1911 Bill of Complaint."

In the Virginian answer (Rec., p. 49):

> "And for further answer to said Bill of Complaint this respondent says that in the matter of the distribution of its supply of coal cars to the mines of the complainants, and other coal mines on its lines of railroad, it is subject to the orders, rules, and decisions, of the Interstate Commerce Commission; that the Interstate Commerce Commission having, in its said decision in the Bell & Zoller case, decided that said Rule 4 of Circular C. S.-31, Revised, is not in principle unreasonable or unduly prejudicial, and in the same decision having expressly reversed its conclusions in the Fairmont case and distinguished the Illinois case, this respondent considers that it was legally bound to put into effect on its railroad said Rule 4, of Circular C. S.-31, Revised, in the distribution of its supply of cars to the coal mines on its line."

The United States of America and the Interstate Commerce Commission relied solely on motions to dismiss based chiefly on the contention that no affirmative order had been made or entered by the Commission and submitted their case on these motions, waiving any right to answer. The case is before this court on appeals by the United States of America and the Interstate Commerce Commission from the denial of these motions to dismiss by the granting to the complainants of the relief prayed for and also on an appeal by the Slab Fork Coal Company et al., shippers of coal by the defendant railway companies, who, deeming themselves benefitted by the action of the railways and Interstate Commerce Commission, intervened as defendants and filed motions to dismiss and answers to the bill. The appeal of the Slab Fork Coal

Company et al. goes both to the denial of their motions to dismiss and to the decree on the merits.

There is no disagreement as to the facts of the case. The issues are solely on two questions of law, first, on procedure, whether the action taken by the Interstate Commerce Commission was such that the denial of transportation by the railways was pursuant to an order of the Commission so that the United States and the Commission were required to be joined and were properly joined as parties defendant and the case heard by a three-judge court; and, second, on the merits, as to whether the complainants were unlawfully deprived of a right of transportation to which they were entitled.

APPELLEES' CONTENTIONS.

Briefly stated, the contention of the appellees is that they have a legal right to their fair share of the car supply of each carrier serving their joint mines; that accordingly, in periods of car shortage, they may on any day offer the prospective output of the mine to either carrier and are entitled to their share of such cars as that carrier has available based on that offer; that, if the cars so secured, leave in their hands, not accepted for shipment, any portion of the rated output of the mine, they may offer that remaining tonnage to the second carrier; and that on that offer to the second carrier they are entitled to the fair share of such cars as that carrier has available.

The appellees asserted in the Court below, and here assert, that their legal rights to contract for transportation as thus defined are supported by legal principles and cannot be taken away or abridged in any

manner or form by the carriers or the Commission. It has been asserted from the outset of these proceedings, upon authority of cases hereinafter cited:

1. That the rights to transportation for which appellees contend and which have been taken away and denied to them by the aforesaid decision of the Commission are guaranteed by the Constitution of the United States.

2. That the carriers defendants below are, by Rule 4 and the decision of the Commission aforesaid, denied the full use of their property for the purposes for which it was dedicated to the public use, in violation of the Constitution.

3. That Rule 4, and the decision of the Commission aforesaid, require, direct and authorize the carriers to depart from the fundamental obligation of their calling each to serve indifferently and without discrimination or preference all persons offering freight for shipment.

That this obligation is several and not joint.

4. That the orders for cars placed by the joint shipper with one carrier do not foreclose his right to call upon the other carriers for a proportionate share of their equipment in which to load the shipments rejected by the first carrier.

5. That Section 22 of the Interstate Commerce Act guarantees to shippers the same rights against the carriers that they had at common law, and the sections of the law giving the Commission authority over the distribution of coal cars give it no greater powers to limit the rights of shippers in the use of equipment than it has when the commodity transported is other than coal.

Section 22 of the Interstate Commerce Act, paragraph (1), 24 Stat. L., 379.

Section 1 of the Interstate Commerce Act, paragraphs (10)-(14), 40 Stat. L., 476.

6. That Rule 4 could not have been legally put into effect by the carriers:

(a) Because it precludes the joint-mine owner, who has offered his output to carrier "A" and had a portion only of his output taken, from getting any transportation from "B" on the portion of his output not taken by "A," which is available for shipment by "B," and on which he has a legal right of transportation by "B."

(b) Because the joint-mine owner has a legal and constitutional right to carriage by "B" as an independent competing carrier of any goods which it has available for shipment, on a parity with any other shipper offering a similar amount of goods to "B."

(c) Because "B" has no right to refuse transportation to a joint-mine shipper because he has previously offered his full output to "A" and had a portion of his goods accepted for shipment on that offer.

(d) Because Rule 4 denies to the joint-mine shipper these legal and constitutional rights to transportation.

(e) Because under Rule 4 the two independent and competing carriers in times of car shortage operate as if they were a single corporate carrier so as to give to the joint-mine shipper only the service, and in some circumstances less than the service, to which he would be entitled if they were in fact a single corporate carrier.

(f) Because any joint arrangement by which the two carriers act under a common rule by

which either carrier refuses transportation to a shipper who has goods to ship by it and offers such goods to it, on the ground that the shipper has previously offered his output to the other carrier and had a portion of the goods accepted on an allotment of cars by it would be an illegal combination in restraint of trade in interstate commerce.

(g) Because the carriers make no such rule with respect to other commodities than coal and the fact that the particular commodity to be shipped is coal has no bearing on the rights of transportation which should be accorded to joint-service shippers, and the picking out of one commodity, coal, for the application of this rule would be arbitrary and unlawful.

7. That Rule 4, being invalid if voluntarily put into effect by the railroads, is also invalid when put into effect by the order and direction of the Commission.

8. That the corrective power of the Court to set aside this action of the Commission is settled by the decision of this Court in *Interstate Com. Com.* v. *Union P. R. Co.*, 222 U. S., 541, and for each of the reasons there recited:

(a) The depriving of the joint mines of their legal rights of transportation was beyond the power which the Commission could constitutionally exercise because the railroads and the shipper are protected in the enjoyment of those rights under the common law and by constitutional guaranties.

(b) The action of the Commission was beyond its statutory power because the Commission is not empowered by the statute to take away rights of and to transportation vested by law in the railroads and the shipper. The power of the Commis-

sion is to execute and enforce the Interstate Commerce Act, not itself to legislate.

The action of the Commission putting Rule 4 into effect was also beyond its statutory power because Rule 4 forces the carriers into a combination in restraint of trade in violation of the Sherman Act.

(c) The action of the Commission was based on a mistake of law, in that the Commission acted under the mistaken legal conception, either that the joint mines had no such legal rights as are here asserted, or that if they did the Commission had power to deny or change them.

(d) Rule 4 as laid down by the Commission is confiscatory of the property rights, both of the railroads and of the joint-mine shipper.

(e) The action of the Commission is invalid because it is arbitrary and founded on no grounds in which the conclusion reached could properly be founded.

(1) The rule is applied only to coal. It is entirely arbitrary to deny to a joint-service shipper of coal transportation rights which have from the commencement of common carriage been enjoyed by all joint-service shippers.

(2) The grounds on which the Commission puts Rule 4 into effect are not such as should or could properly determine the conclusion.

(f) The Commission's course in utterly ignoring and giving no consideration to the legal rights of transportation of the joint mines and in depriving them of those rights on grounds wholly without the Commission's jurisdiction was an exercise of the Commission's powers in an unreasonable manner. The Commission's action takes the form of a car-service rule which is in fact nothing else than a determination of the question of legal rights of transportation.

9. The District Court for the Southern District of West Virginia had jurisdiction of the bill of complaint and is not ousted of its jurisdiction because the order of the Commission was in form negative. The District Court was correct in holding that the order was in fact and effect affirmative in character. In entering the order of dismissal of the complaint before it the Commission had first to, and did, reverse an order which affirmatively condemned a rule which it had previously found unreasonable. This action was affirmative. Furthermore, whatever the form of the order, it authorized and required the carriers to publish and enforce a rule of car distribution which was illegal without such authority.

THE FACTS.

The only facts presented to the Court below in support of the bill of complaint on the merits of the controversy, beyond those appearing in the findings of the Commission, were those tending to establish that the action of the carriers in putting Rule 4 into effect was affirmatively controlled and required by the order of the Commission complained of, and that the Interstate Commerce Commission has never issued an order limiting in any respect the car service to be given to joint shippers of commodities other than coal (p. 135).

History of Rules.

Coal-car distribution rules are rules provided by each carrier serving coal-producing territory in order that the available empty cars of each such carrier in the field of production shall be distributed in times of car shortage without discrimination among the mines served by it. The complexity of the railroad operating

problem in the distribution of coal cars at bituminous coal mines makes it imperative, as a practical matter, that a code of rules govern this operation. The only fact, however, that differentiates the shipment of bituminous coal from that of other commodities is that the nature of the business is such that the coal is tendered for shipment in the cars of the carrier when they have been placed at the mine tipple. The tender for shipment is therefore controlled by the number of empty cars supplied. The legal rights of coal-mine operators do not differ from those of shippers of other commodities. The legal rights and obligations of the parties to transportation contracts are not determined by the orders for cars placed by the shippers but are determined by the supply of cars furnished by the carriers.

Various rules of mine rating and car distribution applied by the several carriers so far as to effect an equitable distribution of the available car supply in the several coal fields have been considered by the Commission and by this Honorable Court in a long series of cases:

R. R. Com. of Ohio et al. v. *H. V. Ry. Co.*, 12 I. C. C., 398.

Traer v. *Chicago & Alton Railroad Co. et al.*, 13 I. C. C., 451.

Interstate Commerce Commission v. *I. C. R. R. Co.*, 215 U. S., 452.

Rail & River Coal Co. v. *B. & O. R. R. Co.*, 14 I. C. C., 86.

Hillsdale Coal & Coke Co. v. *P. R. R. Co.*, 19 I. C. C., 356.

In re Irregularities in Mine Ratings, 25 I. C. C., 286.

Coal and Oil Investigation, 31 I. C. C., 193.
Assignment of Freight Cars, 57 I. C. C., 760.
Southern Appalachian etc. Asso. v. *I. & N. R. R. Co.*, 58 I. C. C., 348.
Lambert Run Coal Co. v. *Baltimore & Ohio R. Co.*, 258 U. S., 377.

To apply the car-distribution rules, each mine on each line of railroad is rated on the basis of the determined daily capacity of the mine to produce and ship coal. This is not disputed upon this record, as the pleadings admit the averment of the bill of complaint in Section IX thereof:

> "The ratings of all mines under said rules represent, for purposes of car distribution, the daily capacity of the mines to produce and ship coal."

The rules for the rating of mines are not in issue in these proceedings, nor were they in issue before the Commission. The case from the outset has been confined to the rights of the shippers of coal to receive cars in which to transport the rated capacity of the mines to ship.

The rules for the distribution of coal cars by each defendant carrier for many years prior to Federal control provided for a pro rata distribution, in accordance with the mine ratings, of available cars among all mines served by each, whether or not such mines were also served by a competing carrier (pp. 26 and 135). Obviously, if a mine were so geographically located as rightfully to demand service from each of two or more carriers, it received, and was entitled to receive, more empty cars for loading than did a local mine of similar rating which was dependent for its car supply on a single one of such lines. Thus in times of

car shortage the joint mines worked more steadily than did mines that were dependent on a single line of railroad. This fact led early to controversy between the local and the joint mines.

In 1911 the situation on the Illinois Central Railroad as between the local and the joint mines was submitted to the Commission for an adjudication upon that carrier's obligations in the premises. The Commission thereupon entered upon an investigation known on its docket as *In Re Irregularities in Mine Ratings, supra.* The Commission's exhaustive study and discussion of the facts and the law, both with relation to the rating and the distribution of cars to mines, are set out in its report in *In Re Irregularities in Mine Ratings, supra,* hereinafter referred to as the *Illinois case.* The Commission therein held: (1) That a joint mine should be rated by *each* carrier at its daily capacity to produce and ship coal, thereby recognizing the right of such mines to offer the entire output of the mine on any day for a shipment by either of the carriers serving it; (2), that when a joint mine shipped a part of its rated capacity by one carrier on a given day it thereby automatically limited its capacity to ship coal by the other carrier serving it, but did not destroy its right to ship the balance of its output by such other carrier; (3) that it would be reasonable for each carrier to announce to its shippers on any afternoon the percentage proportion of the orders for available cars which it would have for distribution on the following day; and (4) that it would be reasonable to provide a rule of limitation upon the distribution to joint mines based upon a percentage of the rated capacity of the mine to produce and ship coal, so that on any day a joint mine which desired to ship

by two carriers should limit its order to each to 75 per cent of its rating; if it were served by three carriers, to 50 per cent of its rating; so that in the aggregate it would not place orders for cars in excess of 150 per cent of its rated capacity to produce and ship coal. The Commission in that proceeding soundly defined the legal rights of the joint-mine shippers and fixed the administrative rules of car distribution within the legal limits of its discretion. The case stood without further controversy until the railroads were taken over by the Government.

During Federal control of the railroads the United States Railroad Administration adopted rules of car distribution which were published as Car Service Circular C. S.-31. In Rule 2 of the rules of car distribution contained in said car service circular it was provided:

> "Copies of orders for cars for a mine that is joint with any other carrier (steam, electric or water) shall be filed with the designated representative of each such carrier; such combinations of orders must not exceed the gross daily rating of the mine."

Thereafter Car Service Circular C. S.-31 was revised and put into effect on January 10, 1919, as Car Service Circular C. S.-31 Revised, in which the rule aforesaid was continued without change but was numbered Rule 4. It is accordingly spoken of throughout these proceedings as Rule 4. The rule thus promulgated by the United States Railroad Administration limited the right of a joint mine to *order* cars in which to ship coal in times of car shortage from all of its connections to

100 per cent of its daily rating, regardless of the supply which such carriers might have available for distribution and regardless of the amount of coal the mine might produce. Under Rule 4, if a joint mine on any day of car shortage *orders* cars to the extent of its rating from one carrier and is *supplied* with only 50 per cent of the order, because that percentage only is available for distribution by that carrier, the mine is not permitted to order any cars from its other connection in which to ship any of the part of its output rejected by the first carrier.

The appellees, as to their joint mines, protested against but acquiesced in the rule laid down by the Railroad Administration, promulgated at a time when there was a continuous or nearly continuous full supply of railroad equipment due to various methods of control of the marketing of coal adopted by the Government, but the rule was continued to the end of Federal control. Immediately thereafter, on March 2, 1920, the Commission issued its circular, recommending to all carriers that they continue in force the said Circular C. S.-31 Revised until such time as the experience of the carriers or the Commission should dictate other and more appropriate rules for the rating and distribution of cars to coal mines. In accordance with and in compliance with said action of the Commission, the rules of said circular were continued in force by the carriers. Under date of April 15, 1920, the Interstate Commerce Commission, acting under its emergency powers, as defined in paragraph (15) of Section 1 of the Interstate Commerce Act, ordered and directed the carriers to modify one of the rules contained in said Circular C. S.-31 Revised, which said modification is not here involved, but otherwise recommended that the

other rules of said circular, including Rule 4, be continued in force and applied; and, *in accordance with and in compliance with said action of the Commission, Rule 4 was continued in force* by the carriers defendant in the court below.

On or about July 8, 1920, these carriers applied informally to the Commission for permission to abrogate Rule 4 and to put into effect the rule laid down by the Commission in the *Illinois case, supra. This* application was refused by the Commission and, because of said refusal, Rule 4 was continued in effect by the carriers.

Proceedings Before Interstate Commerce Commission.

Thereafter, on January 11, 1921, the appellees filed complaints before the Commission separately against the Chesapeake & Ohio Railway Company and the Virginian Railway Company, respectively, alleging as to each carrier that said Rule 4 of Circular C. S.-31 Revised was unjust and unreasonable in violation of section 1 of the Interstate Commerce Act as amended, particularly paragraphs (11) and (12) of said Section 1, and unduly preferential of appellees' competitors, local mines on each such carrier, and prejudicial of appellees in violation of Section 3 of said Act. These two separate complaints were by the Commission consolidated with each other and with certain other similar complaints filed by an operator of joint mines in another field. They were assigned for hearing, brief, argument and decision to Division 5 of the Commission, and the decision of the Commission thereupon was issued by said Division 5 on June 21, 1921, in *Fairmont & Cleveland Coal Co.* v. *B. & O. R. R. Co.,* 62 I. C. C.,

269. A copy of this decision is appended to the bill of complaint as Appendix B (p. 24).

In said decision the Commission found that Rule 4 was unjust and unreasonable and unduly prejudicial of appellees herein, and others similarly circumstanced, and unduly preferential of the mines on each of the carriers that were served singly by each such carrier, and the Commission held and found that the rule laid down in the *Illinois case, supra,* was the just and proper rule and, while stating "We have not required that car service rules be filed as tariff schedules," directed as follows: "We shall expect, however, that defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies thereof with us." The rule of the *Illinois case,* thus authorized and directed by the Commission to be applied by the carriers, was put into effect by the carriers and published in their respective rules of car distribution. By this action of the Commission, Rule 4 was abrogated and the rule of the *Illinois case* came for the time being into effect as the rule prescribed by the Commission.

Complaints substantially similar to those involved in the *Fairmont & Cleveland case, supra,* were filed with the Commission by certain operators of mines served by more than one carrier in Illinois and Indiana against the carriers serving the mines in those states. These complaints were known as Interstate Commerce Commission Dockets Nos. 12,362 and 12,399, respectively. Hearing was duly had upon said latter numbered complaints, and a tentative report upon such record was made by an examiner of the Commission, in which it was proposed to confirm the decision

in the *Fairmont & Cleveland case, supra.* Petition had in the meantime been filed to reopen these latter cases for further consideration and the Commission did reopen them and consolidate them for argument with the records made in Dockets Nos. 12,362 and 12,399. Argument was had upon the records thus consolidating all of the cases involving the car distribution rules to mines served by more than one carrier, and on December 11, 1922, the Commission entered its decision, ruling and order, known as *Bell & Zoller Coal Co.* v. *B. & O. S. W. R. R. Co.*, 74 I. C. C., 433. This decision will be hereinafter referred to as the *Bell & Zoller case.* It is this decision and order that is enjoined in these proceedings. A copy of this decision and order is appended to the bill of complaint (p. 31).

In its decision, ruling and order in the *Bell & Zoller case* the Commission found, in reversal of its previous decision, ruling and order in the *Fairmont & Cleveland case, supra,* that Rule 4 of C. S.-31 Revised was not "in principle unjust or unreasonable or unduly prejudicial" and that "our former conclusions in the Fairmont cases * * * are *reversed,*" and the Commission entered an order to dismiss the complaints in all of the cases recited.

By thus reversing its previous conclusions and directions in the *Fairmont case* the Commission annulled, as of the date of December 11, 1922, its previous action by which it had abrogated Rule 4 as the rule to be followed by the railroads and it simultaneously restored Rule 4 as the effective rule of car distribution.

In its decision the Commission shows the effect of Rule 4 upon the distribution as between the joint and local mines:

"The operation of Rule 4 is shown by the following example: A joint mine with a gross daily rating of 50 cars located on carriers A and B orders all of its cars from carrier A, which has an 80 per cent car supply. The joint mine will receive the same number of cars as a local mine with a daily rating of 50 cars on carrier A. However, if carrier B has a 50 per cent car supply and the joint mine divides its order equally between the two carriers it will receive 80 per cent of 25 cars, or 20 cars, from carrier A, and 50 per cent of 25 cars, or 12.5 cars, from carrier B, a total of 32.5 cars compared with 40 cars received by the local mine on carrier A. Should the joint mine order more than half its cars from the carrier with the greater car supply this will change the figures somewhat, but in no instance will the joint mine receive as many cars as the local mine served by carrier A if the orders are divided. The complainants concede that the joint mine will, in the aggregate, receive more cars than the local mine located on the carrier with the lesser car supply, and it possibly may receive more cars on the average than the local mines of similar rating on both carriers."

Thus it appears that the Commission, by its approval of Rule 4, has authorized and required each of the carriers to limit its car service to the joint mines below that which each such line furnishes of its available cars to the local mines served by it. *In the aggregate the joint mine receives, under the rule, less cars from both carriers in times of car shortage than the local mines served by the carrier having the largest percentage of car supply.* Each carrier, having a several obligation to treat all of its own shippers impartially under the statute and at common law, is none the less authorized and required by the Commission's

order to give the joint mine less service than it gives to the local mine. In other words, car service and transportation furnished to the joint mine by another independent and competing carrier is used to excuse the first carrier for its failure to meet a fundamental and several obligation which its calling entails upon it.

This limitation upon the rights to transportation and the right to contract that is placed upon the joint mine, and which is the gravamen of this proceeding, may be best illustrated by the following example: A joint mine with a gross daily rating of 50 cars located on carriers A and B *orders* the full amount of its rating from carrier A which has an 80 per cent car *supply*. The joint mine will receive the same number of cars as any local mine with a daily rating of 50 cars on carrier A, or 40 cars. The joint mine then has remaining ten cars, that should be as free as any other shipper's coal, and it offers these 10 cars to road B but it is denied transportation of all 10 cars under the rule, notwithstanding that carrier B has a 50 per cent car supply and that, if said 10 cars were offered by a local mine, carrier B would be obligated to furnish 5 cars. The working of the rule is thus stated in its barest simplicity because by placing its orders in the manner last described the joint mine receives more cars than it can by any other method of placing its orders under Rule 4.

A mine that has so located itself as to have the service of both roads has broadened its markets and has entered upon obligations to its customers on both lines of railroad which it must meet. In order, under Rule 4, to get even the same car supply as would a local mine on the road having the larger car supply the joint mine must give up all of its advantages of

location and become itself a local mine on that railway.

The joint mine has acquired its location of this character only by large expenditures of money. The particular joint mines involved in this case are operating for the most part deep-shaft mines which can be operated only at great expense. They must necessarily have a nearly continuous operation in order to meet their very heavy overhead expense. They would not have undertaken such deep-shaft mine development and made the expenditures necessary to the location if they had not relied upon their legal right to transportation over two lines of railroad.

The testimony before the court below upon the irreparable damage that would have been done to the appellees had Rule 4 been permitted to become effective is full and complete and sustains the finding of the court in this regard.

The Various Joint Mine Rules.

Four rules to govern the distribution of cars to joint mines have been considered in the course of the litigation upon this subject. They are set out in some detail below and may be described briefly as, and for convenience are entitled, respectively, (1) The New River Rule; (2) The Common Law Rule; (3) The 150 Per Cent Rule; and (4) The 100 Per Cent Rule (Rule 4).

The New River Rule.

The rules of car distribution as promulgated and applied by the railroads under the mandate of paragraph (12) of Section 1 of the Interstate Commerce

Act, and as approved by the Interstate Commerce Commission are based on the mine ratings as established in the mine-rating rules. For many years prior to the war, as recited by the Commission in the *Fairmont & Cleveland case, supra,* the Chesapeake & Ohio Railway made no distinction between joint and local mines and distributed to the joint mines their proportionate share of the available car supply in the region as determined by the rated capacity to ship, and without reference to or inquiry into the car supply furnished by the Virginian Railway to these mines. In this connection, it seems proper to direct the attention of the Court to an error in the brief for the appellant local mine operators in Case No. 628. Therein, on page 3, the statement is made that "formerly the Virginian and the Chesapeake & Ohio rated mines in different ways, *but in accordance with the shipments made by the various mines over their respective lines during some previous period.*" (Italics ours.) The Commission finds the facts before it to be contrary to what is thus stated. The practice on the Chesapeake & Ohio, and the Baltimore & Ohio, and the Monongahela Railroad as well, was to rate the joint mine on the basis of the full 100 per cent of its determined capacity to provide coal (pp. 25 and 26). It is necessary for each carrier serving a joint mine to rate that mine at the full 100 per cent of its shipping capacity, for otherwise there would be no basis upon which to determine the car supply properly accruing to the joint mine from any particular carrier on such days as that mine may choose to order its entire output from the one carrier. This, indeed, is exactly what the Commission finds must be the correct method of regulating the situation. *In Re Irregularities in*

Mine Ratings, supra, at p. 296, wherein the Commission said:

> "Having the right to assert its full capacity against the Illinois Central on any day, it follows that the junction-point mine must have a rating on the Illinois Central equal to its full capacity, or it would not be able to secure its quota of the available cars on the day when it elects to assert its full capacity against that line."

This method of car distribution to joint mines was also in force on many other railroads. The only limitation placed upon the joint mine was that its orders for cars, based on its rating, should not result in an aggregate car supply greater than the capacity of the mine to ship. If, in practice, the orders were so placed that the supply received from the two railroads exceeded the capacity of the mine to ship, a penalty rule was provided to limit the car supply for succeeding days and ultimately to be reflected in the rated capacity of the mine for succeeding months.

The pre-war rule of the Chesapeake & Ohio we herein refer to as the New River rule. Based on this rule, on the fact that car-distribution rules generally were based on the rated capacity of the mine, on the fact that the obligation of each carrier in the matter of car distribution in times of car shortages is that of equity of distribution between the mines served by each such railroad, and on the provisions of paragraph (12) of section 1 of the Interstate Commerce Act, wherein the obligation is placed upon each carrier severally to distribute cars in accordance with the ratings of the mines, the appellees herein contended before the Interstate Commerce Commission that they

had the right to order 100 per cent of their daily ratings from each of their connections in times of car shortage, and that each road was obligated to serve each of the mines tributary to its rails without discrimination, based on the rated capacity of the respective mines on its line. The appellees conceded before the Commission that the obligation was upon them in the public interest so to arrange their *orders* for cars that the *supply* they received in the aggregate should not exceed the capacity of the mines to ship, and that the obligation of each of the railroads in the public interest was so to limit the car *supply* furnished that there should result no wastage of cars.

The rule last described has sometimes been called the 200 per cent rule, and argument has been made to the effect that the joint mine thereby undertook to order cars in excess of its capacity to ship. Such is not the case. The joint mine's capacity to ship is determined in the same manner as is the local mine's. Of two mines of the same rated capacity, one local and one joint, each offers its rated capacity for shipment. The local mine offers its rated capacity to the single railroad which serves it; the joint mine offers its capacity to two railroads. Each carrier is obligated to furnish cars without discrimination, based on the ratings, as between the mines which it serves on its own line of railroad.

It was contended, therefore, that so long as the railroads, the Commission and the Interstate Commerce Act employed the rated capacity of the mine as the basis for distribution in times of car shortage, the carriers might, without violating any obligation which they had to other shippers, distribute cars under the New River rule; and that this rule might with pro-

priety be found by the Commission to be just and reasonable, and violative of no property rights of local mines on either line of railroad. Local mine operators on the Virginian have no rights in the car supply furnished by the Chesapeake & Ohio, and *vice versa,* the Chesapeake & Ohio operators have no property rights in the cars furnished by the Virginian. The joint mine has property rights in the car supply of each.

The New River rule was applied by the carriers prior to the war in consonance with their practices as to commodities in general. That is to say it is the practice of the carriers, in order to secure for their respective lines all possible competitive freight, to give to joint shippers of commodities the best possible car service that is compatible with their obligations to shippers solely dependent upon them for car supply.

Had the Commission granted in full the prayer of the complaint, local-mine operators would have had no right to complain that their legal rights had been invaded. If the Commission had exceeded this prayer and granted more to the joint mines than is included therein, the local-mine operators might have had a just cause of complaint that their legal rights had been invaded. So here, the joint mines have complained that the Commission has exceeded its legal and statutory powers in authorizing and directing the carriers to reduce car supply below the limits of legal right as stated by the Commission itself in the *Illinois case, supra,* and as known to the common law.

When, in the *Fairmont & Cleveland case, supra,* the Commission put in effect the rule known as the Illinois or 150 per cent rule, the appellees acquiesced in said decision, believing that, although the Commission thereby reduced the car supply of joint mines some-

what below the minimum of their legal rights, nevertheless the rule was a practical one and granted to the joint mine operators an approximation to their minimum legal rights.

In the area between the maximum desires of the joint mine operators (the New River rule) and the minimum of their legal rights (the common law rule) the Commission's conclusions were final upon all the parties. When the Commission went beyond this field of its administrative action it invaded property rights of the appellees which the courts are bound to protect as guaranteed by the common law and by the Constitution.

The Common Law Rule.

In its opinion in the *Illinois case, supra,* the Commission's reasoning points to the rule which the Appellees rely on as the proper measure of their minimum rights. The rule which would follow the reasoning in the *Illinois case* is hereinafter referred to as the common law rule. It is described in the dissenting opinion of Commissioner Potter in the *Bell & Zoller case, supra,* in the following language. (The entire dissenting opinion is quoted):

> "I favor the application of the rule of the *Illinois case.* To do otherwise is in my judgment to deprive of valuable advantage of location and destroy absolute right under the law. It seems to me the majority report tends to make law rather than apply and enforce it. I think a joint mine has the right to be regarded by each road as though that road were the only road serving it. It loses no right from one when another reaches it.

It should receive prorated equipment from each road based on the traffic which it tenders to that road in proportion to the traffic tendered by other mines. The volume to be considered as its tender to a particular road is its rated output less the tonnage to be shipped by other lines. The rule of the *Illinois case* in application recognizes a mine's rights and affords method to work them out with substantial justice in a practical manner. If opportunity to ship over more than one road gives a joint mine an advantage in being able to furnish to labor more nearly continuous employment, that advantage belongs to the mine because of the superior transportation service available to it. We may not restrict the use of transportation facilities in order to equalize mine operation. To do so would be to require discrimination in the use of equipment—not remove it. If a local mine is at a disadvantage it is not because of a transportation problem with which we may deal but because of a labor supply problem which is not for us. It is by no means certain that the application of the rule of the *Illinois case* affects labor injuriously or tends to disturb the adjustment."

In the *Illinois case, supra,* the Commission requires that the carriers shall furnish daily to the operators a statement of the available car supply for the following day. Under the car service rules appended to the bill herein (paragraph 4(j) of the rules) the mines place their orders at 4 p. m. on each day for the following day.

To quote from the Commission's report in the *Illinois case,*

"The junction-point mine has a right to ship its output via either of the lines serving it."

and that it has the right to offer its entire output to carrier A or to carrier B and is entitled to its share of the available equipment of the carrier to whom it makes the offer. If the output is offered to carrier A and it has a short car supply it accepts this offer as to the part of the output which it can take, according to its percentage allotment of car supply, and necessarily is obliged to reject the remainder of the output.

The Commission in the *Illinois case* rejected the New River rule by which the joint mine used its full rated capacity as a basis for transportation orders from both carrier A and carrier B. It did this on the ground that when it had offered its capacity output of 3,000 tons to carrier A and 1,000 tons had been accepted for shipment, the shipper did not have this 1,000 tons to ship by carrier B but only 2,000 tons. It is to be noted this conclusion is not in violation of the decisions which will be cited holding that a carrier can not refuse transportation because a shipper has shipped part of its goods by another carrier. Carrier B has an obligation to transport only such goods as the shipper has for shipment.

The legitimate conclusion from the sound reasoning in the *Illinois case* was that the joint mine had rights of transportation as follows: That it could offer first to either carrier its entire rated capacity; that that carrier having accepted a part of the output which was offered, the shipper could then offer the rejected tonnage to the other carrier and would be entitled to transportation from that carrier on these goods, or if it was short in car supply, to a percentage of the goods proportional to the car supply. This is unquestionably the rule of common law, and the Appellees' claim is

that the rule thus described represents their minimum legal right to transportation which neither the railroads nor the Commission have the right to invade.

Illustrating this rule by specific figures: If the joint mine has a capacity of 50 cars, carrier A has an 80 per cent car supply and carrier B has a 50 per cent car supply, the mine can offer the 50 cars for shipment to A. A accepts, based on its 80 per cent car supply, 40 cars for shipment. The mine offers B the 10 rejected cars and B accepts 5 cars for shipment, based on its 50 per cent car supply. The joint mine will therefore get a total of 45 cars. It will be found that it makes no difference to the joint mine as to the total cars which it will receive on the application of this principle, whether it first offers its full capacity to carrier A or to carrier B, and that this is true whatever the figures of percentage of car supply may be on the two roads.

The 150 Per Cent Rule.

The Commission, in the rule which it laid down in the *Illinois case*, did not carry out its reasoning, as indicated under the last heading, to its legitimate conclusion by prescribing a rule of procedure as shown by the last illustration.

The reason which it gives for not so doing is that it might be difficult to determine which carrier should have the first offer of the mine's output and therefore the larger shipment. As a matter of fact, this would be determined, and properly determined, by the lawful option of the shipper first to offer its full output to whichever carrier it chooses. A shipper has the legal right to choose as he may like as to his shipment

between two or more carriers available to it. This is recognized by the Commission itself earlier in the *Illinois case,* where it says that the shipper—

> "may on any day tender its entire output to either of such lines and is entitled to its share of the available equipment on that basis."

There might be important and controlling reasons why, on account of the location of his customers, the shipper would feel impelled to send the larger amount of his goods by one carrier than by the other, or he might, on account of the greater efficiency of one carrier, prefer to ship by it. Such choice is the shipper's legal right.

For the reasons stated the Commission, however, put in what might be called a "rule of thumb." This did not secure to the joint mine its exact legal due, but it was nevertheless a rule susceptible of practical application and did substantially secure to all mines, both local and joint, the car supply to which they were entitled. This rule, which has come to be known variously as the Illinois rule, or the 150 per cent rule, was, as stated by the Commission, as follows:

> "We think that on days for which it orders no cars from any other carrier, the junction-point mine should be given its pro rata of cars by the Illinois Central on the basis of its full rating; that on a day for which it orders cars from one other road, its rating on the Illinois Central for that day should be 75 per cent of its full rating; and that on a day for which it orders cars from two other roads, its rating on the Illinois Central for that day should be 50 per cent of its full rating."

If the Illinois rule is applied to figures it will be found to work, in comparison with what the rule we have heretofore described as the common law rule calls for, and which the appellees claim measures their legal right of transportation assured to them by law, to the advantage of the joint mine when the shortage of cars on the two roads is slight, but to the disadvantage of the joint mine when there is an acute shortage.

For example, suppose the joint mine has a 50-car rated capacity and carrier A a 60 per cent car supply and carrier B a 50 per cent car supply. According to the common law rule the joint mine would first offer its full rated capacity to A and then offer its rejected output to B, or *vice versa*, and in either case would receive in the aggregate 40 cars, as follows: Shipper offers 50 cars to A; A, according to its percentage of car supply (60 per cent), accepts 30 cars and rejects 20; the shipper offers the rejected 20 cars to B, which, according to its percentage of car supply (50 per cent), takes 10 cars—total received by shipper, 40 cars.

Under the 150 per cent rule a shipper would receive from carrier A 60 per cent of 37.5, or 22.5 cars, and 50 per cent of 37.5, or 18.75 cars. Total number received, 41.25 cars. The joint mine shipper thus gains 1.25 cars by the 150 per cent rule.

On more acute car shortage, say with carrier A having a 40 per cent supply and carrier B a 30 per cent supply, the result is the other way. Following its legal rights to transportation, the shipper would get 20 cars from A and 9 cars from B, an aggregate of 29 cars. Under the 150 per cent rule, a shipper would get 15 cars from A and 11.25 from B, or a total of 26.25. The more acute the shortage the more the 150 per cent rule works to the joint mine's disadvantage.

The value of a car supply increases relatively to the shortage, for it is at times of most acute shortage that prices are highest and that the good will of customers is especially built up by service.

Both in depriving the joint mine shipper of this right to order its full output from either carrier first, according to its best business advantage, and in cutting down the proper transportation rights of the joint mine in times of serious car shortage, the 150 per cent rule encroaches materially on the joint mine's legal rights. Nevertheless, the appellees abided by it, though pointing out that the 150 per cent rule was unjust to them.

Rule 4, now ordered and authorized to become effective by the Commission, is destructive of the appellee's rights and the appellees have no choice but to seek legal relief therefrom.

Before leaving the illustrations given above of the application of car distribution rules, the Court's attention is called to the fractional car figures that result. This frequently happens and demonstrates that legal rights are determined not by the orders but by the supply of cars. Under no system of distribution are cars each day placed at mines with meticulous accuracy, as the Court would be led to believe in the comments in brief for the Commission concerning the alleged impracticability of the rule for which appellees contend. Inequalities of supply furnished by the carriers on any day are ironed out and corrected on subsequent days. (See Distribution Rule 11, p. 23.)

The 100 Per Cent Rule.

The rule provided by Rule 4 of Circular CS-31, Re-

vised, as heretofore stated, was adopted during the Federal control of railroads during the war. The rule was annulled by the Commission in the *Fairmont & Cleveland case;* and the action of the Commission in the *Bell & Zoller case,* in reversing its prior action, again orders Rule 4 into effect.

The operation of Rule 4 is to deprive the joint mine owners of what the appellees claim is their legal right of transportation, namely, (1) to first *order* cars as for the entire output from carrier A; (2) to receive from A an acceptance for transportation of such portion of the offered output as A can take, according to its car supply, and an allotment of cars to transport the same; and then (3) order cars from carrier B for the portion of its output which has been rejected by A and receive an allotment from B of a proportional number of cars according to its car supply percentage based on the amount of goods offered to it for transportation.

The business of the joint mine is developed to serve customers, some of whom can be reached only by one of the carriers and some only by the other, and is based on having the full service of each of the carriers to the extent that it needs it. In times of car shortage it is not only by Rule 4 cut down to the status of a one-line mine, *but in actual operation must necessarily be reduced to a lower status than the local mine on the line having the larger car supply.* The joint mine has customers on the line of the road having the lesser car supply and must completely lose the good will and therefore the business of those customers if it fails them in times of short car supply and scanty coal supply; therefore, it must use the road having the lesser car supply, in which case it will, under Rule 4, receive less cars in the aggregate than the single-line mine.

Developed in its investment, equipment, organization and overhead expenses to do a business based on the service of two roads, and in reliance on that service, it is nevertheless reduced to a lower status than the mine located on one of the two roads and whose investment and business has been developed in reliance only on the service of that road.

There is no dispute about the practical effect of Rule 4, which is stated by the Commission in its report in the *Bell & Zoller case* (heretofore quoted at page 19 of this brief).

The Commission did not say, but Rule 4 in terms provides that if the joint mine orders its full rating from A on a given day it is not permitted to order any of the cars rejected by A from B. Nor did the Commission say, what is equally obvious, that if on a given day the carrier to which the cars are first offered has no cars available (even after accepting an order for part of the cars offered) the joint mine is nevertheless, under Rule 4, prohibited from ordering any cars from the second carrier.

It is to be noted also that the rule applies even if one of the carriers happens to have a full or surplus car supply. In those circumstances, if the joint mine is obliged to make use of the other carrier to supply customers located on that line and whose needs may be acute, the joint mine to that extent is precluded from making use even of a surplus of cars on the first line.

ARGUMENT.

Jurisdiction of the Court.

Upon the appeal to this Court, the appellants,

United States and Interstate Commerce Commission, rely chiefly upon the motions to dismiss the complaints that were filed by them in the court below. Also the intervening local-mine operators urge again the motion to dismiss which was filed on their behalf in the three-judge court. The first eleven exceptions filed by the United States and Interstate Commerce Commission, hereinafter collectively referred to as the Government, in Case No. 627, and the first thirteen exceptions filed by the intervening local-mine operators in Case No. 628, go to one or the other of the following propositions:

(1) That the order of the Interstate Commerce Commission complained against was negative, and therefore not reviewable by the courts.

(2) That the question presented for adjudication in these proceedings was one which rested *wholly* in the discretionary power of the Commission and was therefore not reviewable by the courts.

Interwoven in the second of these propositions is the contention of the Government that the facts alleged in the complaint did not constitute a cause of action in equity.

With respect to these contentions the position of the appellees here is that the decision of the District Court for the Southern District of West Virginia is based upon sound principles of law in that:

(1) The decision, order, and ruling of the Commission in the *Bell & Zoller case, supra,* was affirmative in character, substance and effect, and therefore reviewable.

(2) An order of the Commission, to fall within

the rule laid down by this Court in the *Proctor & Gamble case,* 225 U. S. 282, must be negative in substance as well as in form.

(3) The case of *Proctor & Gamble Co.* v. *United States, supra,* and cases resting thereon, upon which the appellants rely, do not oust the courts of jurisdiction to review a negative order of the Interstate Commerce Commission in cases such as this where the Commission has stepped beyond the realm within which its administrative judgment is supreme, and has affirmatively denied relief that is guaranteed to litigants by the Constitution, common law, and the statutes under which the Commission obtains its jurisdiction.

(4) Whatever else may be said regarding the negative character of the order of the Commission, it affirmatively authorized, permitted and required the carriers to publish and enforce the objectionable rule of car distribution, in derogation of their common-law obligation to serve these complainants indifferently with the other operators of coal mines served severally by them.

The Commission's Order Is Affirmative in Substance and Effect.

It is the contention of the appellees here, sustained by the Court below, that the action taken by the defendant railroads as to Rule 4 has at no time been taken on their own initiative, according to their own views, or of their own volition, but that they have at all times acted in accordance with and pursuant to the directions, dictation, decisions, rulings, requirements and orders of the Commission and by its authority. The course of events as to Rule 4, as already shown, was as follows:

(1) It was by order of the Director General of

Railroads in force at the termination of Federal control.

(2) From March 2, 1920, two days after the termination of Federal control, until July 8, 1920, it was kept in effect by the carriers pursuant to recommendations of the Commission of March 2, 1920, and April 15, 1920.

(3) On July 8, 1920, the carriers defendant below applied to the Commission to abrogate Rule 4 and to put into effect the Illinois Rule. This application was refused by the Commission and because of this refusal Rule 4 was kept in effect. It was thus the action of the Commission which kept it in force.

(4) On June 21, 1921, in the *Fairmont case, supra,* which was a formal proceeding which had been brought before the Commission for the abrogation of Rule 4, in which the appellees and the carriers defendant below were all parties, the Commission held that Rule 4 was unjust and unreasonable and unduly prejudicial of the complainants and that the Illinois Rule was the just and proper rule and directed as follows: "We shall expect * * * that the defendants will promptly amend their car service rules so as to conform with our findings, and evidence the same by filing copies thereof with us." This the carriers promptly did, taking out Rule 4 and substituting the Illinois Rule therefor.

(5) Later the Commission reopened the *Fairmont case,* consolidated it with the *Bell & Zoller case, supra,* and on December 11, 1922, rendered a decision in the consolidated case in which it found the Illinois Rule was not a proper rule, but that Rule 4 was the proper rule and reversed its previous abrogation of Rule 4 in the *Fairmont* decision, stating "Our former conclusions in the *Fairmont case,* based on a mistaken adherence to and extension of the decision in the *Illinois case,* are reversed."

This action on the part of the Commission by which Rule 4 was again ordered into effect was on its own initiative and not on the application or request of the defendant carriers, and, in fact, contrary to their views of what rule should prevail, as was shown by their application of July 8, 1920, for permission to abrogate Rule 4. The Commission by its order in the *Bell & Zoller case, supra,* made its report, in which it reversed its conclusions in the *Fairmont case, supra,* a part of the order; after Rule 4 had been abrogated and the Illinois Rule substituted in accordance with the Commission's first decision and direction in the *Fairmont case, supra,* Rule 4 was out of existence and there was nothing for the petition in the *Fairmont case, supra,* to be applicable to except as the Commission itself might on the hearing on the reopened case first put back Rule 4 and then deny the petition to abrogate it. That is exactly what it did do.

This reinstatement of Rule 4 was by the *affirmative action of the Commission on its own initiative.* Such action is clearly reviewable on the question of the legality of that Rule raised in the complaint herein.

Under these circumstances the District Court correctly held that Rule 4 was published by the carriers because of and pursuant to action of the Commission requiring them so to do.

It cannot be doubted that if the complainants, on the theory that the recent abrogation of the Illinois Rule and the reinstatement of Rule 4 was solely the voluntary act of the railroads, had brought their bill of complaint against the railroads without joining the United States, any court would, on evidence of the action as to Rule 4 which has been taken by the Commission and evidence that the railroads had, through-

out, acted, as to Rule 4, and were now acting, pursuant to and under the authority of the decisions, rulings and orders of the Commission, have held that there was no jurisdiction except in a three-judge court in a suit in which the United States was made a party as representing the Commission, as was held both by the Circuit Court of Appeals and by this Court in the cases of

Baltimore & O. R. Co., v. *Lambert Run Coal Co.*, 267 Fed. 776, at p. 781 (opinion by Woods, C. J.).

Lambert Run Coal Co. v. *Baltimore & Ohio R. Co.*, *supra.*

The inaccuracy of the contention that the *Procter & Gamble case*, *supra*, is authority for the proposition that no negative order of the Interstate Commerce Commission is reviewable is of such consequence in this proceeding that it seems appropriate to review the cases on that particular subject.

Before the creation of the Commerce Court the decisions of this Court had settled and determined the precise extent within which the Circuit Courts of the United States could review the reports, decisions, and orders of the Interstate Commerce Commission. Just prior to the creation of the Commerce Court and the transfer to it of the jurisdiction formerly had by the Circuit Courts in these matters, the extent of that jurisdiction was summarized in a very concise way in two decisions of this Court. In *Interstate Commerce Com.* v. *Illinois C. R. Co.*, 215 U. S., 452, 470, this Court said:

"The statute endowing the Commission with

large administrative functions, and generally giving effect to its orders concerning complaints before it without exacting that they be previously submitted to judicial authority for sanction, it becomes necessary to determine the extent of the powers which the courts may exert on the subject.

"Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of delegated authority under which it purports to have been made; and (c) a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it in truth to be within the elementary rule that the substance, and not the shadow, determine the validity of the exercise of the power."

These principles limited the Commission's action in fixing rates as to which it has a very large power and discretion; *a fortiori* they apply to a case turning on legal rights of transportation which is a question peculiarly for a court of law to determine.

The action of the Commission in putting Rule 4 into effect should be set aside for each of the reasons enumerated in *Interstate Commerce Commission* v. *Union P. R. Co., supra,*

(1) The depriving of the joint mines of their legal rights of transportation was beyond the power which the Commission could constitutionally exercise because the railroads and the shipper

are protected in the enjoyment of those rights under the common law and by constitutional guarantees.

(2) It was beyond the statutory power of the Commission because the Commission is not empowered by the statute to change or take away rights of and to transportation vested by law in the railroads and the shipper. "The power given is to execute and enforce, not to legislate."

It was also beyond the statutory power because Rule 4 forces the carriers into a combination in restraint of trade in violation of the Sherman Act.

(3) The action of the Commission was based on a mistake of law. In the *Illinois case, supra,* the legal rights in transportation of the joint mine are clearly stated and the rule laid down was intended to be in accordance with those rights and was in approximation thereof, but on account of the failure of the Commission to carry through its reasoning to its legitimate conclusion left the joint mines with less than they were legally entitled to. In the *Bell & Zoller* decision the Commission acted under the mistaken legal conception either that the joint mines had no such legal rights or that if they did the Commission had power to deny or change them.

(4) Rule 4 laid down by the Commission is confiscatory of the property rights both of the railroads and of the joint mine shipper as is shown at pp. 61 *et seq.* of this brief.

(5) The action of the Commission is invalid because it is arbitrary and founded on no grounds in which the conclusion reached could properly be founded.

(a) The rule is applied only to coal. The question involved is in no way peculiar to coal being solely the question as to what are the transportation rights of a joint service shipper. It is entirely arbitrary to deny to a joint service

shipper transportation rights, which have from the commencement of public carriage been enjoyed by all joint service shippers, merely because the particular commodity which the shipper desires to have transported is coal.

Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540, at pp. 560 and 563.

Matthews v. *The People of the State of Illinois*, 202 Ill. 389.

Crescent Liquor Co. et al. v. *Platt*, 148 Fed. 894.

Royal Brewing Co. v. *Mo., K. & T. Ry. Co.*, 217 Fed. 146.

If this change in transportation rights could be made as to one kind of merchandise at a time no industrial investment could be made with any relation to transportation facilities, as the particular merchandise produced by that industry might at any time be picked by the Commission for a change as to transportation rights. The question as to what are the proper rights of a joint service shipper as to transportation service is a general one and cannot properly be left in one way as to merchandise in general and dealt with in another way as applying to a certain kind of goods.

The intervening defendants in an amendment to their answer set up that the American Railway Association has adopted a rule applying to grain similar to Rule 4 as applied to coal. No such rule as to grain or any commodity other than coal has been put into effect by an order or decision of the Interstate Commerce Commission, and, if it had been, would as not applied to commodities in general be open to the same legal objection of arbitrariness, as well as to the other objections relied on by the complainants in this case as to Rule 4. No rule of the American Railway Association can be

legally obligatory. How far such a rule is followed as to grain by the railroads of the country in actual practice does not appear by any proof.

Reference is made to the following decisions of the Interstate Commerce Commission as to car distribution on grain shipments:

Farmers' Elevator Co. v. *C., M. & St. P. Ry. Co.*, 47 I. C. C. 475, decided November 28, 1917.

Tanner & Co. v. *C., B. & Q. R. R. Co.*, 53 I. C. C. 401, decided June 9, 1919.

Neither of these decisions in any way touched upon the question of orders for cars by a shipper located on more than one carrier.

(b) The grounds on which the Commission puts Rule 4 into effect are not such as should or could properly determine the conclusion.

The grounds are first that the transportation service enjoyed by the joint service shipper tended to the greater development of points where there was service by two or more carriers and tended to the seeking of access to those points by carriers by acquiring trackage rights or otherwise; and, secondly, that the dissatisfaction of labor was accentuated by the greater opportunities of labor at joint service localities.

The Commission refers to a wastage of cars but this is a matter merely of proper policing and, if necessary, of penalties.

(6) The Commission's course in utterly ignoring and giving no consideration to the legal rights of transportation of the joint mines and in depriving them of those rights on the grounds on which the Commission's conclusions were reached was an exercise of its powers in an unreasonable manner. While the Commission's action takes the form of a car service rule, it was in fact nothing else than a determination of the question of

legal rights of transportation, which is a proper question for court determination. The substance and not the shadow must be looked to. If the legal right to transportation is as contended for by the complainants herein then the right to cars for the transportation of tonnage offered by the joint mine to the respectve carriers follows as a matter of course.

The Order of the Commission Invades Legal Rights.

Nowhere in the decisions antedating the creation of the Commerce Court does there appear to be drawn the distinction between the "affirmative" and "negative" orders as such which has been made following the decision in the *Proctor & Gamble case, supra.* It is not necessary before this Court to review the history of that litigation so far as the Commerce Court was concerned. It suffices to say that that Court had attempted to interpose itself between the Commission and the Supreme Court as an appellant commission, empowered as an administrative tribunal, as well as an appellate court of law. This Court in its decision made it abundantly plain that no *administrative* questions covered by a negative order of the Interstate Commerce Commission are reviewable by the courts. The case stands for all time as the authority for that proposition.

The controversy before the Commission in the *Procter & Gamble case, supra,* differed widely from that which was presented to the Commission in this proceeding. There the Procter & Gamble Company was using its private property, namely, its privately-owned freight cars, in its service in interstate commerce. The carriers applied to such cars the same rules and charges respecting detention and demur-

rage as were applied to carrier-owned cars. The Procter & Gamble Company contended that those rules and charges were unreasonable and constituted an unjust discrimination against it. The question thus raised was solely an administrative one, strictly within the purview of the Interstate Commerce Commission, whose judgment with respect thereon was final. Thus is the doctrine of the *Procter & Gamble case* interpreted by this court in its very recent decision in *Baltimore & O. R. R. Co.* v. *United States,* decided March 3, 1924, 68 L. Ed. —. The property in question was private property, but had, as a matter of fact, been submitted by the Procter & Gamble Company to use in interstate commerce.

Here the complaint before the Commission was not merely one seeking relief with respect to an administrative question. It raised also the question of the legal right of these joint mines to the service of both the carriers. The problem before the Commission was, therefore, one of mixed law and administration, but because it involved the exercise of the Commission's administrative jurisdiction it had necessarily to be brought to the Commission rather than to the courts in the first instance. To have proceeded otherwise would have violated the rule laid down in a long series of cases by this Court.

Texas & P. R. Co. v. *Abilene Cotton Oil Co.*, 204 U. S., 426;

Interstate Commerce Commission v. *Illinois C. R. . Co.*, 215 U. S. 452;

Louisville & N. R. Co. v. *F. W. Cook Brewing Co.*, 223 U. S. 70;

Loomis v. *Lehigh Valley R. Co.*, 240 U. S. 43.

See in this connection the contentions of the complainants in the *Fairmont & Cleveland case, supra,* and in the *Bell & Zoller case, supra,* as recited by the Commission and found in the transcript of the record of No. 627 at pages 26, 28-29, and 37.

The action before the Commission, it will be observed, sought not only the establishment of the legal right of the joint mine to transportation from all the carriers serving it, but submitted the administrative regulation of that right to the Interstate Commerce Commission.

The appellees' constitutional, common law, and statutory right to service which it is here sought to enforce, is inevitably tied up with the jurisdiction of the Interstate Commerce Commission to say how it shall be enforced, but the right exists, nevertheless, and the fact that it is involved in and depends upon certain provisions of the act to regulate commerce makes it necessary for the appellees first to go to the Commission in an assertion of their rights. It cannot therefore be said that after so doing they may be estopped by the mere form of the Commission's order in negative language from a review of the affirmative action of the administrative body which curtails the right guaranteed by the Constitution, by the statute, and by the common law.

Contemporaneously with the decision in the *Procter & Gamble* case, *supra,* this court decided the case of *Hooker* v. *Knapp,* 225 U. S. 302. There the court used language which carefully saves to appellees herein their rights of appeal to this court. See *Hooker* v. *Knapp, supra,* at page 323, where the court said:

"We have determined in the *Procter & Gamble case,* 225 U. S. 282, 32 Sup. Ct. Rep. 761, that the commerce court was but endowed in considering whether an affirmative order of the Commission should be enforced, on the one hand, or set aside and declared nonenforceable on the other, with the jurisdiction and power existing at the time that act was passed in the circuit courts of the United States. And as, at that time, it was conclusively settled that the courts had only authority to re-examine the findings of the Commission as to subjects like the one here under consideration, for the purpose of ascertaining whether the action of the Commission was repugnant to the Constitution, in excess of the statutory powers conferred upon it, or manifested such an abuse as to be equivalent to an excess of authority, it clearly results that the court below was likewise limited in passing upon the petition before it in this case. This being true, it is also necessarily true that virtually the sole authority of the court below was in a sense confined to determining questions of law arising upon the case as presented on the face of the pleadings."

The later decisions of this Court on this subject confirm the language cited. In *Kansas City S. R. Co.* v. *United States,* 231 U. S., 423, 439 and 440, this Court defined the jurisdiction of the Commerce Court in substantially the same language as used in cases defining the jurisdiction over the decisions of the Commission formerly had by the Circuit Courts. The Court said:

"The authority conferred by Congress upon the commerce court (act of June 18, 1910, 36 Stat. at L. 539, chap. 309; Judicial Code, Sec. 207, 36 Stat. at L. 1148, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 216) with respect to enjoining or setting aside the orders of the Commission, like the au-

thority previously exercised by the Federal circuit courts, was confined to determining whether there had been violations of the Constitution, or of the power conferred by the statute, or an exercise of power so arbitrary as virtually to transcend the authority conferred."

Very soon after this Court's decisions in the *Procter & Gamble case* and in *Hooker* v. *Knapp, supra,* there came a series of other decisions respecting the court review of the action of the Interstate Commerce Commission. These have made it clear that the limitations on such review, fixed in the *Procter & Gamble case* and in *Hooker* v. *Knapp, supra,* apply only when the action of the Commission was truly negative and within the scope of its statutory authority. Orders that are negative merely in form, but affirmative in substance, are clearly subject to review by the courts.

The Tap Line Cases, 234 U. S. 1.

Intermountain Rate Cases, 234 U. S., 476.

M'Lean Lumber Co. v. *United States,* 237 Fed., 460.

Hillsdale Coal & Coke Co. v. *Pennsylvania R. Co.,* 237 Fed., 272.

St. Louis Southwestern Ry. v. *United States,* 234 Fed., 668.

Louisiana & P. Ry. Co. v. *United States,* 209 Fed., 244.

The Government lays stress upon the decision of this Court in *Lehigh Valley R. Co.* v. *United States,* 243 U. S. 412, 414. But the language of the Court in that decision is in itself confirmance of the finding of the District Court in the instant case in that there this Court took cognizance of the distinction between

purely negative orders and orders which were negative in form but affirmative in substance.

Let the Court consider for a moment the position of your appellees when the Commission entered its final order of dismissal in the *Fairmont & Cleveland case*. The requirement of that order and of the Commission's report and decision, embraced therein by reference and incorporation, was laid upon the *railroads*, defendants before the Commission. Nothing was therein left to the volition of your appellees. Unlike the railroad in the *Lehigh Valley case*, they had no option as to their conduct in the matter determined by the Commission. They were absolutely foreclosed by the action of the railroads upon which the Commission laid the requirement to reinstate Rule 4. And the railroads had proceeded to comply with that order and requirement.

In *Manufacturers R. Co.* v. *United States*, 246 U. S., 457, this Court again affirmed its previously expressed opinions that the Commission's judgment was supreme when properly exercised on matters lying within its administrative discretion, but the Court further points out that in matters of constitutional right the Commission was not supreme.

In the late case of *Central Railroad Co. of New Jersey* v. *United States*, 257 U. S., 247, this Court draws the same distinctions between findings of fact and findings of law of the Commission and the extent to which the same will be reviewed. This case is particularly pertinent here as showing the power of the Courts to review the Commission's conclusions of law. It is to be noted also that the decision of the Commission was reviewed as a part of the order. In that case the Court said:

"As to administrative orders operating *in futuro*, the Commission's findings of fact are conclusive, subject to qualifications here not pertinent; and a finding that the discrimination is unjust is ordinarily a finding of fact. Maufacturers R. Co. v. United States, 246 U. S. 457, 481, 482, 62 L. Ed. 831, 842, 38 Sup. Ct. Rep. 383. But the question presented here is whether the discrimination found can be held in law to be attributable to the appellants, and whether they can be required to cancel existing joint rates unless it is removed. No finding made by the Commission can prevent the review of such questions."

The Court will note that in the instant case the appellees claim that as a matter of law the Interstate Commerce Act expressly provides that they are entitled to the relief to which their complaint before the Commission was directed, and that the decision and order of the Commission refused that which the statute in affirmative terms declares shall be granted.

The decision of this Court in the *Inter-mountain Cases, supra,* is conclusive of the jurisdiction of the three-judge court to review the order of the Commission here. At page 490 of that decision the following language is used:

"The second contention as to jurisdiction yet further affords an illustration of the same mental attitude, since it rests upon the assumption that the order of the Commission refusing to grant the request of the carrier made under the fourth section was purely negative and hence was not subject to judicial inquiry. The contention therefore presupposes that the power which from the beginning has been the subject of judicial review by the mere fact of its transfer to the Commission was made arbitrary. Besides, the proposi-

tion disregards the fact that the right to petition the Commission conferred by the statute is positive and while the refusal to grant it may be in one sense negative, in another and broader view it is affirmative since it refuses that which the statute in affirmative terms declares shall be granted if only the conditions which the statute provides are found to exist. It is, of course, true as pointed out in *Interstate Commerce Commission* v. *Illinois Central Railroad*, 215 U. S. 452, 470, and since repeatedly applied that findings of fact made by the Commission within the scope of its administrative duties must be accepted in case of judicial review, but that doctrine, as was also pointed out, does not relieve the courts in a proper case from determining whether the Constitution has been violated or whether statutory powers conferred have been transcended or have been exercised in such an arbitrary way as to amount to the exertion of authority not given, doctrines which but express the elementary principle that an investiture of a public body with discretion does not imply the right to abuse but on the contrary carries with it as a necessary incident the command that the limits of a sound discretion be not transcended which by necessary implication carries with it the existence of judicial power to correct wrongs done by such excess."

Again, on the jurisdictional question, the appellees rely upon the decision of this Court in *Skinner & Eddy Corp.* v. *United States*, 249 U. S., 557. Whatever may be contended by the appellants as to the negative character and effect of the order in the *Bell & Zoller case, supra*, it can not be denied that it was a requirement, an authority and a permission of the Commission for the carriers to put and keep Rule 4 in effect. The order is therefore clearly reviewable because Rule

4, so authorized by the Commission to be put in effect, deprives the appellees of transportation rights to which they are by law entitled. Stated in another way, if the bill in this proceeding had been brought to enjoin an order of the Commission by a complainant which had not applied first to the Commission for relief, the three-judge court would have had authority to have annulled and set aside the order and requirement of the Commission. This is clearly indicated by the following language in the *Skinner & Eddy case, supra*:

> "The defendants contend that the District Court did not have jurisdiction of the subject-matter of this suit; because orders entered in a fourth section proceeding cannot be assailed in the courts; at least, not until after a remedy has been sought under Sections 13 and 15 of the Act to Regulate Commerce. This contention proceeds apparently upon a misapprehension of plaintiff's position. If plaintiff had sought relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory, the remedy must have been sought primarily by proceedings before the Commission (citing a long list of cases); and the finding thereon would have been conclusive, unless there was lack of substantial evidence, some irregularity in the proceedings, or some error in the application of rules of law (citing a long line of cases). But plaintiff does not contend that 75 cents is an unreasonably high rate or that it is discriminatory or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure

> redress in a proceeding before the Commission. (Citing cases) The Sacramento Case (United States v. Merchants & Mfrs. Traffic Asso., 242 U. S. 178, 61 L. ed. 253, 37 Sup. Ct. Rep. 24) was a case of this character. Compare Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, 92; Southern Pacific Co. v. Interstate Commerce Commission, 219 U. S. 433. The District Court properly assumed jurisdiction of this suit."

The Court will note that the District Court mentioned was a three-judge Court, specially constituted as was the Court below.

Finally, the theory of jurisdiction on which appellees have proceeded herein has been justified by this Court's decision on March 3, 1924, in *Baltimore & O. R. Co.* v. *United States, supra.* Throughout your appellees here have insisted that regardless of its form, the order of the Commission and the report embraced by reference therein, constituted an authority, a requirement, a permission, upon and to the carriers, to abolish the Illinois rule and to reestablish Rule 4. And thus that order, regardless of its form, is reviewable. For, said this Court in the case last cited, respecting an order that *authorized* the acquisition of one carrier by another:

> "Nor would the further fact that the order is permissive preclude review if by that term is meant an order, which, in contradistinction to one compelling performance, authorizes a carrier to do some act otherwise prohibited.".

From the decisions cited the conclusion follows inevitably that the court review of the reports, decisions

and orders of the Commission is governed by one or the other of the following propositions:

> 1. A negative order of the Commission denying relief in any case falling solely within the limits of the administrative power of the Commission is not reviewable by the courts because such review would, in substance, amount to a substitution of the judgment of the court for that of the Commission on a matter exclusively reposed in the Commission by the Congress.
>
> 2. Any order or requirement of the Commission which infringes or denies constitutional, statutory, or common-law rights or authorizes action by carriers which is equivalent to the infringement or denial of such rights, or is entered by the Commission under a mistake of law, or which is entered by the Commission acting arbitrarily or in an unreasonable manner, will be reviewed by the courts.

The instant case falls under the second of the propositions stated above, the effect of the order and requirement herein being an affirmative denial of legal rights, final jurisdiction of which is reposed in the courts and not in the Commission.

Application of the Law to the Facts of This Case.

Assuming, therefore, that the District Court for the Southern District of West Virginia correctly took jurisdiction of the bill of complaint in this proceeding, the application of the law to the facts found by the Commission in the present case is briefly as follows:

The Chesapeake & Ohio Railway has purchased, built, and equipped a railroad property in the New River District of West Virginia for service to the

mines located thereon. The mines are also served by the Virginian under trackage rights which it has acquired for valuable consideration. These mines thereon are entitled to the service of each railroad under the findings of the Commission. There are frequently long-continued periods of car shortage. Assume that during such a period of car shortage the Virginian has a 60 per cent car supply and the Chesapeake & Ohio has a 40 per cent car supply, and that a particular mine entitled to joint service has a rated output of 50 cars per day. The mine first offers its full output on a given day to the Virginian. The Virginian is able to accept and does accept, on account of its short car supply, only 30 cars of the 50 offered and rejects the offer of the remaining 20 cars. The mine then has 20 cars left for shipment. It desires to ship these by the Chesapeake & Ohio and offers them to that line. It is the lawful right of the mine to have its goods taken by the Chesapeake & Ohio on a parity with any other shipper offering a similar amount of goods. With a 40 per cent car supply, the Chesapeake & Ohio is under the legal obligation to take 8 cars. It cannot refuse to take them because the mine has chosen to ship a part of its coal via the Virginian, and the mine owner has both a common-law and the constitutional right to receive this transportation service from the Chesapeake & Ohio. If the two railroads entered into an agreement or arrangement by which each would refuse such shipment because the shipper had first closed with the other as to a shipment of part of its goods, such an arrangement or agreement would be unlawful as in restraint of interstate commerce. As a matter of fact, neither road desires to enter into such

arrangement, but on the contrary wishes to give the service which it is required by law to give.

At this point, however, the Interstate Commerce Commission intervenes, and by Rule 4 requires and authorizes the Chesapeake & Ohio to refuse transportation under the circumstances stated and requires and authorizes the Chesapeake & Ohio, in every case where the situation is as stated, to refuse transportation. It is the contention of the appellees here that the clear law is as found by the District Court, namely, that the carriers themselves could not so deny the transportation right of the mine owner and that there is no right in the Interstate Commerce Commission thus to deprive either the railroad or the mine owner of lawful rights to contract for transportation, and that the Commission is clothed with no power to authorize or permit or compel or require the railroads to enter into an arrangement which thus restrains interstate commerce.

Such was the law as analyzed and laid down by the Commission in the *Illinois case, supra,* where the Commission soundly stated:

> "The junction-point mine *has a right* to ship its output via either of the lines serving it." (Italics ours.)

And again:

> "If the shipper is unable to secure from the first line cars for more than 1,000 tons and still is able *to produce* 3,000 tons, it has 2,000 tons which it desires to ship over the second line." (Italics ours.)

It is the legal obligation of the second carrier to

accept this 2,000 tons, if it has a full car supply, or, if it has a short car supply, to accept such portion of it as it can take, according to its percentage of car supply. This is in accord with the principle which is stated most succinctly in the language of the Supreme Court of Maine:

> "Common carriers are bound to carry indifferently, within the usual range of their business, for a reasonable compensation, all freight offered, and all passengers who may apply."
>
> *New England Express Co.* v. *Maine Central R. R. Co.*, 57 Me. 188.
> *Southern Express Co.* v. *Memphis etc. R. Co.*, 8 Fed. 799, 802.
> *Messenger et al.* v. *Penn. R. R. Co.*, 36 N. J. Law Rep. 410.
> *A. T. & S. F. R. R. Co.* v. *D. & N. O. R. R. Co.*, 110 U. S., 667.
> *Missouri P. R. Co.* v. *Larabee Flour Mills Co.*, 211 U. S., 612.

The second carrier cannot refuse to take these goods because another and competing carrier has already accepted 1,000 tons of the shipper's output for carriage. As stated by the Supreme Court of Illinois in *C. & A. R. R. Co.* v. *Suffern*, 129 Ill., 274:

> "One railroad company is not justified in refusing to permit the owners of a coal mine to ship coal over its road because such owners also shipped coal from the same mine over the road of another railroad company. It is the duty of a railroad company to carry any freight that is offered provided its legal charges for such carriage are paid. It cannot take the position that it will not carry coal from a mine upon the line of its road unless it is allowed to carry all the coal from

such mine. It is for the interest of the public that there should be full and fair competition between the different railroad companies operating their lines in the state. Serious injury will result to the business interests of the country if shippers can be compelled by arbitrary measures to patronize one railroad to the exclusion of all others. No monopolies would be more odious than those which would result from the adoption of such a policy."

See also:

State Ex. Rel. v. *Citizens Telephone Company,* 61 So. Car. 83.
Bennett v. *Dutton,* 10 N. H., 481.
Sanford v. *Railroad Co.,* 24 Pa. St. Rep., 378.

The obligation of each of the carriers in the instance cited above is several and not joint. All of the pertinent provisions of the Interstate Commerce Act to which reference is made in Article VIII of the complaint lay the separate obligation upon each carrier. Particularly is the Court's attention called to the language of paragraph (12) of Section 1:

"It shall also be the duty of *every* carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by *it,* whether located upon *its* line or lines customarily dependent upon *it* for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of *the carrier* to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Fail-

ure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States." (Italics ours.)

We shall later herein discuss the language of this paragraph of the Act to Regulate Commerce in connection with another exception filed by the intervening coal operators, appellants in Case No. 628. We refer to it here in connection with the finding of the Commission in all of the cases that the shipper has a right to order from every carrier the entire amount of its rating, and to call attention again to the proposition that in this case the appellees insist upon their right to order from the second carrier that part of their rated output which the first carrier has rejected. The paragraph from the Interstate Commece Act quoted makes very clear that Congress has not attempted to curtail the rights of the shipper had at common law.

These transportation rights may be illustrated by a homely example where coal is not the commodity transported. At Chicago, Ill., there are large stockyards. A shipper has 50 carloads of cattle in the stockyard. He calls up the Pennsylvania Railroad and asks if it can handle the shipments East. The Pennsylvania says that it can handle only 80 per cent of them on account of a short car supply and cannot accept the rest. The shipper directs that the 40 cars be placed and he will load them. The shipper then calls up the New York Central and asks if it can ship the 10 remaining cars. The New York Central, having a full car supply, places the 10 cars. Is there any

doubt that the shipper has the right to order the cars itself immediately from the New York Central without in any way affecting the obligation of the Pennsylvania to take the 40 cars under the contract for transportation which has been closed with it and for the fulfillment of which the shipper has reserved the 40 carloads of cattle to be taken? Any other view would lead to the ridiculous conclusion that the shipper must hold, feed, and pay for the care of the remaining 10 carloads of cattle at the stockyards until the Pennsylvania took the 40 carloads away, all to the benefit of no one and to the detriment of everyone.

The Commission, in the *Illinois case, supra,* found the law to be in full accord with what is contended in this illustration, but in the *Bell & Zoller case, supra,* it says:

> "We have indicated in proceedings of this character that the principle of *stare decisis* has no application, and that our determinations as to what will for the future be just and reasonable must meet changed conditions and wider knowledge, as developed by the passage of time."

We submit that this statement of the Commission can refer only to its decisions upon strictly administrative questions. Certainly the law remains the law, regardless of how administrative matters may be determined. But by its reversal of the *Illinois* rule after it had been in operation nearly 10 years, under the doctrine above laid down, the Commission, with a change of personnel, has reversed its *legal* conclusion. If the power of the Commission is so broad no industry would be safe in building up at a railroad center in reliance on the service of the roads located there,

for, with Rule 4 in effect, no industry could rely on the larger proportion of car supply which such location would give to it in time of car shortage.

That the Commission does not apply the doctrine of *stare decisis* to administrative questions is a proper recognition of the statutory enactment limiting the effectiveness of its orders within the Commission's discretion. But the legal limitations within which the Commission's powers are determined are as unchanging as the Constitution itself and to these limitations the doctrine of *stare decisis* applies immutably. That doctrine likewise applies to the legal rights of joint-mine operators, as defined by the Commission in the *Illinois case, supra.*

These rights to contract for transportation for which the Appellees contend are affirmatively granted to shippers by the language of the Interstate Commerce Act. Section 22, paragraph (1), (24 Stat. L., 379), guarantees the same rights to shippers against the carriers that they had at common law, and as heretofore pointed out, the sections of the law giving the Commission authority over the distribution of coal cars give it no power to limit the rights of shippers in the use of equipment greater than it has when the commodity transported is other than coal. The obligation of the carriers is placed severally upon each by the language of the Act. (See Section 1 of the Interstate Commerce Act, paragraphs 10 to 14, 41 Stat. L., 476.)

Constitutional Guaranties.

The right thus to contract with the second carrier for the transportation of the goods rejected by the first carrier is guaranteed by the Constitution of the

United States. It is provided by the Fifth Amendment of the Constitution of the United States that:

> "No person * * * shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation."

And in the Fourteenth Amendment protection is given against the violation of these rights by a sovereign state.

This Court, in *Allgeyer* v. *Louisiana,* 165 U. S., 578, at p. 589, defined what is included and covered by these guaranties.

See also:

Lochner v. *New York,* 198 U. S. 45, at page 53.

Matthews v. *The People of the State of Illinois,* 202 Ill. 389.

Hitchman Coal & Coke Co. v. *Mitchell et al.,* 172 Fed. 963.

Opinion of the Justices, 220 Mass. 627.

In re Jacobs, 98 N. Y. 106.

Within both the liberty and property rights guaranteed by the Constitution is the right to make lawful contracts for the transportation of goods and to have such transportation. The right to deny transportation would in many cases amount to the right to destroy. In the case of a railroad the liberty to make lawful contracts of transportation is of the essence of any profitable use of the invested property and it is equally so in the case of a mine owner; but the right of any shipper to transportation is, under the cases which have been cited, within the protection of the Constitutional guarantees, and has been expressly held so to be in

Crescent Liquor Co. v. *Platt,* 148 Fed. 894 (C. C. N. D. W. Va., Goff, J.).

The common carrier's obligation to carry for all who offer, indifferently, raises in the public a correlative right to the service of the common carrier. That is a property right, guaranteed by the Constitution, and enforceable in the Courts.

Louisville & N. R. Co. v. *F. W. Cook Brewing Co.,* 223 U. S., 70.

United States v. *Louisville & N. R. Co.,* 195 Fed. 88.

Danciger v. *Wells, Fargo & Co.,* 154 Fed., 379.

Then again, the common carrier, in the performance of its public obligations, must use its facilities of shipment and carriage. The right to use property is itself "property" as defined by the Constitution, and if one be deprived of or restricted in the use of his property, even though he remain in full and complete possession and control thereof otherwise, his Constitutional rights are violated.

St. Louis v. *Dorr,* 145 Mo., 466.
Denver v. *Rogers,* (Colo.) 25 L. R. A. N. S. 247.
State v. *Charleston,* 112 S. E. Rep. 577.
Fruth v. *Board,* 75 W. Va., 456.

Yet the operation of Rule 4 as prescribed and required by the Commission to be made effective measureably restricts, limits, and in fact may prohibit the shipment of coal by the joint mine and the acceptance and the transportation of that coal in interstate commerce by these carriers. Thus the property of both joint mine and carrier is taken, not for a public use, but only to be applied to the increase of the service of mines not so favorably located as are the joint mines. And ac-

cordingly it is a taking without due process of law, it is contrary to the Fifth Amendment, and the Commission's order and requirement are void.

While Congress under the Constitution has exclusive power to regulate interstate and foreign commerce, and this power to regulate has been held in sundry cases to embrace the power to prohibit, the courts have repeatedly pointed out that the Constitutional power even in Congress to regulate commerce among the states, although plenary, is not arbitrary, and does not carry with it the right to destroy or impair those limitations and guaranties which are also embodied in the Constitution or in any of the amendments thereto.

> *U. S.* v. *Joint-Traffic Association*, 171 U. S., 505.
> *Monongahela Nav. Co.* v. *United States*, 148 U. S., 312.
> *I. C. C.* v. *Brimson*, 154 U. S., 447.
> *Hammer* v. *Dagenhart*, 247 U. S., 251.

In the case last cited this Court disposed of the contention that Congress had power to prohibit the movement of ordinary commodities, saying with reference to the power of Congress to regulate interstate commerce:

> "In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities. But it is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit, the movement of ordinary commodities, and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental au-

> thority, state or national, possessed over them, is such that the authority to prohibit is, as to them, but the exertion of the power to regulate."

And after reviewing the cases the Court concluded that:

> "In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results."

Every case that we have found, in which a bar against the shipment in interstate commerce of a commodity has been upheld by the Court of last resort, has involved a commodity of such character that, for the protection of the public safety, health or morals, its production, sale, transportation in intrastate commerce or use for the purpose intended could be constitutionally prohibited and made a criminal offense under the police power. No attempt of Congress to restrain the interstate transportation of a commodity in itself harmless and not intended for an unlawful use has ever been upheld. Congress, in the present instance, has delegated its powers to regulate to the Interstate Commerce Commission under specific instruction which justifies no such use of the regulatory power as the Commission attempts by the prohibition here. To justify a prohibition of interstate commerce it must definitely appear that the traffic prohibited is in a commodity shipped with evil intent or that the transportation of it will accomplish harmful results. The necessities of modern life, fuel, clothing, and foodstuffs do not fall within this definition. They are neither evil in themselves nor can their free movement in interstate commerce produce harmful results, as those

words are used by makers and interpreters of the law. Certainly the Commission has not attempted to justify its action on any such theory.

Moreover, to come within the doctrine of those cases wherein the absolute prohibition of transportation in interstate commerce has been upheld, such prohibition must be complete as to the commodity involved. An order of the Commission can not authorize the carrier to which freight is offered to discriminate between shippers of a single commodity on its own line and escape condemnation as class legislation, also prohibited by the Constitution.

Connolly v. *Union Sewer Pipe Co.*, 184 U. S., 540.

Royal Brewing Co. v. *M. & K. T. Ry Co.*, 217 Fed, 146.

Matthews v. *The People of the State of Illinois*, 202 Ill., 389.

Crescent Liquor Co. et al. v. *Platt*, 148 Fed., 894.

Thus Rule 4, being invalid if put into effect by the railroads voluntarily, is also invalid when put into effect by the order, direction or permission of the Commission.

See also:

Interstate Commerce Commission v. *Baltimore & Ohio Ry Co.*, 145 U. S., 263.

Interstate Commerce Commission v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S., 479.

Southern P. Co. v. *Interstate Com. Commission*, 200 U. S., 536.

Commission's Conclusions.

The language of the Commission in its conclusions in the Bell & Zoller decision does not avoid the legal

limitations within which its administrative discretion must be confined. It seeks apparently to avoid passing upon the legal limitations of its jurisdiction that were raised by the appellees.

What the Commission finds, and seemingly finds objectionable and what it seemingly considers a justification of Rule 4, is stated by the Commission thus:

> "The superior advantages of the joint mine over its local competitor * * * have resulted in a proportionately greater development of the industry at points where mines may be served by two or more carriers rather than by one."
>
> "A duplication of trackage and of trackage rights has followed in numerous instances."
>
> "There has been extreme dissatisfaction in the ranks of mine labor, accentuated, in any event by irregularities in opportunities for working time and wages."
>
> "The results of such disturbed labor conditions have been harmful to the carriers and shippers." (Transcript No. 627, p. 41.)

It may well be doubted that the power to regulate interstate commerce, lodged in the Congress, is synonymous with the police power of the state. But whatever the fact be as to that there would seem to be no doubt that the Interstate Commerce Act does not constitute the Interstate Commerce Commission as the guardian of the public health, the public safety, or the public welfare. It may be that the development of great industrial and distributing centers is economically undesirable. It is not clear that duplication of trackage rights is an evil *per se*. The Commission has certainly not so held in the past. The Court may profitably consider in this connection the Commis-

sion's action in a series of related cases reported simultaneously with or shortly after the *Fairmont & Cleveland case, supra,* and all cited in the brief of the appellant local mine operators herein at page 72. They are:

Ridge Coal Mining Co. v. *M. P. R. R. Co.,* 62 I. C. C., 259.

Dering Mines Co. v. *Director General,* 62 I. C. C., 265.

Hillsboro Coal Co. v. *C., C. & St. L. Ry Co.,* 63 I. C. C., 401. Reopened and reaffirmed 81 I. C. C., 216.

Benton Coal Mining Co. v. *C., B. & Q. R. R. Co.,* 63 I. C. C., 396.

Franklin County Mining Co. v. *C. B. & Q. R. R. Co.,* 63 I. C. C., 396.

Cameron Coal Co. v. *M. & E. R. R. Co.,* 63, I. C. C., 434.

In these cases the Commission did, as that brief points out, find that the joint mines had certain advantages, in the matters of routes and car supply particularly, over the local mines, but, said the Commission:

> "Upon a careful consideration of the question presented in the light of the evidence of record we conclude that the mines of complainant's competitors which are given a joint status by reason of the Burlington serving them under trackage agreements are in the same category as junction-point mines; that there is no logical distinction between the two; that the actual or constructive location of the competing mines upon two or more lines of railroad substantially differentiates their situation from that of the complainant's local mine; and that the preference and advantage over the complainant which such competing mines

enjoy by reason of service by two or more lines, is not undue."

(*Ridge Coal Mining Co.* v. *M. P. R. R. Co., supra,* at p. 262.)

It may be unfortunate that labor enjoys more even working time in some mines than in others. Those, however, are not matters entrusted to the administrative regulation of the Interstate Commerce Commission. And it may be noted that the greater claims of the common point, served by more than one carrier, over the local point, served by an individual railroad, have always and consistently been recognized.

Interstate Commerce Com. v. *Diffenbaugh,* 222 U. S., 42-47.

Southern P. Co. v. *Interstate Commerce Com.,* 219 U. S., 433-452.

Interstate Commerce Com'n. v. *Cincinnati, P. & V. R. Co.,* 124 Fed., 624.

Interstate Commerce Commission v. *Western & A. R. Co.,* 88 Fed., 186.

Interstate Commerce Commission v. *Louisville & N. R. Co.,* 73 Fed., 409.

Commodity Rates to Pacific Coast Terminals, 32 I. C. C., 611.

Bowling Green Business Men's Asso. v. *L. & N. R. R. Co.,* 31 I. C. C., 1.

Lebanon Commercial Club v. *L. & N. R. R. Co.,* 28 I. C. C., 301.

Indianapolis Freight Bureau v. *C. C. C. & St. L. Ry. Co.,* 16 I. C. C., 277.

But the Commission rests its order upon two other findings than those quoted above, as follows:

"The practice indicated in the *Illinois case* seems, in certain instances, to result in a waste of

car-days which in view of the effects of recent and present car shortages should be avoided."

And:

"Whatever tends to inflate the nominal mine ratings beyond the amount which can normally be produced and shipped is distinctly counter to the public interest."

These matters are within the administrative discretion of the Commission and its conclusions with regard to them would be final to justify some sort of regulation if they were not in fact contrary to the findings of the Commission or reached under a mistake of law. The finding of the Commission with regard to the wastage of cars was set out in the report of the Commission in the *Fairmont & Cleveland case, supra,* shown on page 30 in Case No. 627, as follows:

"During 1920 cars left over at local mines on the Chesapeake & Ohio averaged 8.2 per cent of cars placed, while those left over at joint mines in the New River district averaged 11.4 per cent. The left-overs on the Virginian at joint mines were slightly in excess of the left-overs at local mines, due in part to the physical conditions on what was formerly the White Oak Railway. The Virginian operates over that line only in the daytime, and efforts are made to get sufficient cars to the mines the night preceding for the commencement of operations the following day. If cars are placed too late in the afternoon to be loaded they are reported as being left over. A witness for the Chesapeake & Ohio testified that the question of left-over cars was largely a matter of policing, and that if proper information were given to each railroad regarding the order

and supply of cars there would be no occasion for cars being left over at joint mines to a greater extent than at local mines. This witness testified that rule 4 is defective in that it does not require that all lines serving joint mines be supplied with such information as would make over-ordering impracticable, and thus make full utilization of the empty equipment available from day to day.

"The complainants concede that the railroads should exchange such information as will enable them to police left-over cars, and that very few joint mines have trackage facilities greater than their capacity to ship. No difference appears in this record in the latter respect between joint and local mines."

On the strength of that finding as to the facts, the Commission, in the *Fairmont & Cleveland case, supra,* required that Rule 4 be canceled and the Illinois rule established. Then, in the *Bell & Zoller Case, supra,* the Commission reaffirmed that finding as to the facts, except in respect to a few words better eliminated or changed, in the light of the Commission's reversal of conclusion. Compare transcript No. 627, page 30, and page 39.

The Court will observe that on the Virginian the left-overs resulted from empty cars being placed too late in the day to be loaded. Such left-over cars certainly result from no fault of the mine, and the Commission finds at any rate that at joint mines they are only slightly in excess of the left-overs at local mines. To whatever extent left-overs existed at Chesapeake & Ohio mines the Commission finds they result from a deficiency in Rule 4, the very rule the Commission now requires shall be established. On the other hand, the Commission also finds that left-overs can be avoided

by proper policing and full utilization of all car supply thereby secured. The Commission's conclusions on this point are, therefore, directly contrary to its findings of fact.

With respect to the conclusion that the rule laid down by the *Illinois case, supra,* has a tendency to inflate the ratings of joint mines in times of car shortage, the Court's attention is directed to three propositions:

(1) That the rating of the mines was not an issue before the Commission;

(2) That the conclusion is at variance with the fact found by the Commission in the *Bell & Zoller case, supra:*

> "The evidence indicates that in times of car shortage mine ratings, *both local and joint,* becomes inflated an average of 33 1-3 per cent." (Italics ours.)

(3) That the conclusion is at variance with the conclusion in regard to mine labor.

Assuming that the ratings become inflated, as the Commission says, because of the shortage, it is entirely inconsistent to conclude that the joint mine can *at the same time* work more steadily than the local mine, and inflate its ratings more than the local mine. For, if the working time is more steady in the joint mine, it has less opportunity to inflate its ratings than has the local mine. And the Court will note that in the *Bell & Zoller case,* as quoted, *supra,* the Commission finds the inflation of ratings the same at both joint and local mines. Furthermore, while the mine ratings used were not before the Commission in the *Fairmont & Cleveland* or *Bell & Zoller cases,* the Commission found in the *Bell & Zoller case:*

> "The present decision is of course without prejudice to such determination of the questions before us in the general proceeding indicated as involving the mine rating and car-distribution rules as the record may there require."

If there be anything wrong with the mine rating rules it is not shown by the findings of the Commission above quoted, and the place to correct it is not in a proceeding which involves only the distribution rules, unless it be properly brought in issue upon the evidence adduced to support the conclusion reached. Certainly the facts found in the *Fairmont & Cleveland* and *Bell & Zollner cases* support the opposite conclusion from that reached by the Commission, *and its first conclusion on those facts, was opposite.*

The appellees insist that whatever basis of rating determines the capacity of mines, local or joint, to ship, the distribution of cars based on the rating is required by paragraph (12) of Section 1, and that the rating having once been determined no discrimination between local and joint mines by either carrier is permitted under the statute.

But if the Court should determine that the rating rules are material, its attention is called to the language of those rules whereby it will be shown that the rating of the joint mine would be exactly the same if each carrier rated the joint mine in accordance with the shipments made via its line.

Thus a local mine that has produced 62,500 tons in the preceding month under the rule, working to produce the same 200 hours in the month, would under the calculations of the rating rule produce 312.5 tons per hour. This quotient, multiplied by 8, would give the rating to the mine of 2,500 tons per day, or 50 cars. A joint mine of the same capacity producing in the

aggregate in the same month 62,500 tons and shipping 25,000 tons by one carrier and 37,500 by the other, would work the same aggregate number of hours, but it would work only 80 hours in producing 25,000 tons shipped by the first carrier and 120 hours to produce the 37,500 tons shipped by the second carrier; 25,000 tons divided by 80 gives the same production per hour, or 312.5 tons, or 50 cars per day, as the local mine of the same capacity has, or as the joint mine has by using its aggregate loadings from the two carriers. The tonnage loaded to the second carrier in 120 hours would also give a rating on that carrier of 50 cars per day. It is thus seen that the rating of the joint mine is not changed by the fact that it is called a gross daily rating and computed so as to rate the mine the same on both lines. It gains no advantage in rating in this manner, or, as found by the Commission:

> "A rating (of a local mine) so determined is called the daily rating, as distinguished from the gross daily rating which applies to a joint mine, *and which is determined in a similar manner*, but by taking the total tonnage shipped over the lines of all the carriers serving the mine."

Assignments of Error as to Effect of Decree of District Court.

Exception XI of the Government is that the District Court erred in substituting its judgment for the judgment of the Interstate Commerce Commission concerning a regulation pertaining to the distribution of cars for the transportation of coal in interstate commerce. Exception in almost identical language is taken by the appellees in Case No. 628 in their excep-

tion XIII. These exceptions disregard the language used by the District Court and the legal effect of its order. The concluding paragraphs of the opinion of the Court, page 58 of the printed appeal, are as follows:

> "We mean only to hold that Circular CS-31, rule 4 (revised), and the action of the carriers in putting it in force, is erroneous, and must be enjoined and suspended.
>
> "The order will be entered without prejudice to the Interstate Commerce Commission making proper orders relative to reasonable car distribution, to joint as well as local mines, not in conflict with the views hereinbefore expressed."

The Court has, by its decision and order, in no sense substituted its judgment for that of the Commission on any question that is within the administrative discretion of the Commission. The effect of the order of the District Court was merely to set aside Rule 4, as being in excess of the statutory powers of the Commission, arbitrary and in violation of transportation rights of the appellees. The issue raised by the bill was as to whether Rule 4 is an encroachment on the appellees' lawful rights and should be set aside. The Court kept strictly within the issue in this regard, and the effect of the decree was automatically to restore the application of the rule laid down by the Commission in the *Illinois case, supra,* and again in the *Fairmont & Cleveland case, supra.* If the Court erred at all in this regard it was in failing to define to the Commission the legal limitations within which it might exercise its administrative discretion. The appellees contend that their legal rights are defined in the rea-

soning of the *Illinois case,* as set out at pages 26 *et seq.* herein, and that the Commission may exercise its discretion only in the area between the rule suggested by the reasoning of the *Illinois case* and reiterated in Commissioner Potter's dissent in the *Bell & Zoller case,* on the one hand, and the 200 per cent rule for which the appellees contended before the Interstate Commerce Commission on the other hand. The appellees insist that the decision and decree of the District Court left the Commission free to lay down such rule as it saw fit within these legal limitations.

Assignment of Error as to Form of Decree.

The Government's Exception XII to form of decree, also contained in Exception XIV in Case No. 628, is not insisted upon on brief. Equity Rule 71, referred to in the assignment of error, is identical with former Equity Rule 86. This rule came before this Court for consideration in the case of *Putnam* v. *Day,* 22 Wallace, 60. See also *McClaskey* v. *Barr,* 48 Fed., 130; *United States* v. *Goldstein,* 271 Fed. 838. If any of the matter objected to should not have been included in the decree, its inclusion affords no ground for reversal of the decree if the final conclusion reached by the Court in the case was sound, but it is ground merely for an order to modify the decree by eliminating any recitals which were not appropriately included.

Other Assignments of Error in Case 628.

There have been discussed heretofore herein all of the exceptions to the decree of the lower court filed

by the Government and the corresponding exceptions filed by the appellant coal operators. Of the remaining ten exceptions filed by the latter, XVII and XIX raise no question that has not heretofore been discussed. Exception XVI covers an inadvertent misconstruction of Rule 4 by the District Court in a matter which has no bearing upon the issues raised in this proceeding, either in the District Court or here.

Exception XV is:

> "That the said District Court erred in finding that under Rule 4 of Circular CS-31 Revised, a joint mine stands in no better position than a local mine."

This finding by the Court is merely a repetition of the finding made by the Commission with respect to the effect of the application of Rule 4, both in the *Fairmont & Cleveland case, supra,* and in the *Bell & Zoller case, supra.* In the former case, after reciting in detail the effect of the order, the Commission held:

> "While it is true that the joint mine has an advantage by reason of its location on two railroads because of the additional markets which it can reach, it is likewise true that the joint mine is not always in a position to avail itself of its alleged advantage because of the practice in the coal business to make contracts for yearly periods beginning with April 1. Neither is it possible at all times for the joint mines to order all their cars from the carrier having the greater car supply, as its contracts may also require shipments to be made by the line having the lesser car supply in order to meet its current obligations. It frequently happens that the joint mine receives a less car

> supply than the local mine situated on the road having the greater car supply."

And in that case also the Commission concluded that Rule 4 was unreasonable and unduly prejudicial to joint mines and unduly preferential of local mines.

Again, in the *Bell & Zoller case, supra,* the Commission set out the effect of the rule in detail and found:

> "Should the joint mine order more than half its cars from the carrier with the greater car supply this will change the figures somewhat, but *in no instance will the joint mine receive as many cars as the local mine served by carrier A if the orders are divided.*" (Italics ours.)

The rule, by its terms, provides that if a joint-mine shipper orders 100 per cent of its rating from one carrier and is served only with a percentage of cars sufficient to carry a part of the goods, the part rejected cannot be even offered for shipment to the second carrier.

Appellant coal operators' Exceptions XVIII, XX, XXI and XXII raise questions so closely related as properly to be discussed together. They revolve around the proposition contained in the XVIII exception:

> "It is insisted that no joint mine has a right to transportation or to receive cars for transportation unless it makes an actual or constructive tender of sufficient coal to load the number of cars ordered, and, as the daily rating of a joint mine presents its maximum capacity to tender coal for shipment, it also represents its maximum capacity to make reasonable requests for cars."

The contention of the appellants, as we understand it, is that the ordering of cars lies wholly within the administrative functions of the Commission, and the request for cars from the second carrier is an unreasonable request for transportation within the meaning of Section 1 of the Interstate Commerce Act because it is not seasonably made. This contention is based upon the proposition that when the shipper orders cars from road "A" on Monday for Tuesday's loading, it thus makes a tender of all of its coal and must keep that tender intact until the cars are supplied, and that when the cars are supplied by "A" it is too late to make an order for Tuesday's loading on road "B."

It is to be noted that the appellant coal operators do not here controvert the merit of appellees' claim that they have the right to ship by carrier "B" coal not taken by carrier "A," but endeavor to show that the appellees have been successfully cut out of any effective exercise of this right by rules of the Commission as to when cars shall be called for. If this were so it would only establish the unreasonableness and invalidity of the rules so adopted, but it is not so.

It is clear that when the order for cars for Tuesday's loading is accepted on Monday, that constitutes a contract for the carriage of such coal as may be loaded in the number of cars agreed to be furnished. The Commission, in the *Illinois case, supra*, found that the carrier should announce on the day previous to the placement the proportionate share of cars which it will be able to furnish. The balance of the shipper's offer of such coal is rejected by carrier "A" on Monday afternoon and is, therefore, available at that time for offer for Tuesday's loading to carrier "B."

When, on the operator's request on Monday for cars

for the operator's full mine rated output, the carrier agrees, on account of a short car supply, to furnish only a portion of the cars requested, the contract is closed and the obligation is reciprocal for the carrier to furnish the number of cars agreed to be furnished and no more, and for the operator to furnish the amount of coal to fill those cars and no more. This contract is followed by the actual tender on the following day, but the cars come to the coal and not the coal to the cars; the tender is only of the number of cars which the carrier has agreed to furnish and requires the furnishing by the operator only of the amount of coal required to fill them. The carrier has no right or interest beyond this.

That there is the legal right to thus contract for the supplying of cars and that the making of such contract determines reciprocally the rights and obligations between the parties is well established by decisions in various jurisdictions.

Clark v. *Ulster & Delaware R. R. Co.*, 189 N. Y. 93.
Texas & P. Ry. Co. v. *Nicholson*, 61 Texas 491.
Easton v. *Dudley*, 78 Tex. 236.
Pittsburgh C. C. & St. L. R. Co. v. *Racer*, 5 Ind. App. 209.
Rudolph v. *Wagner*, 36 Ala. 698.
Fremont Canning Co. v. *R. R. Co.*, 180 Mich. 283.
Chattanooga So. R. R. Co. v. *Thompson*, 133 Ga. 127.
Grimes v. *Lake Erie & W. Ry. Co.*, 143 Ill. App. 532.
Wood v. *Chi. M. & St. P. Ry. Co.*, 68 Iowa 491.
Baker v. *The K. C. St. J. & C. Ry. Co.*, 91 Mo. 152.
Outland v. *R. R. Co.*, 134 U. S. 350.

These cases settle the proposition that when a contract for carriage is thus complete there is no burden upon the shipper to hold its goods for a physical tender at the time the cars are supplied. The rejection of part of the shipment in advance is a waiver by the carrier of any physical tender from the shipper beyond the goods sufficient to complete the contract theretofore entered into at the time of offer and acceptance. As stated in *Texas & P. Ry. Co.* v. *Nicholson, supra:*

> "A tender is rendered unnecessary where the party proposing it is informed in advance that it will be useless and will not be accepted."

The rule contended for by the appellant coal operators would be subversive of all present-day business practices, and would, in addition, have the effect of making a way station of every competitive railroad point. This is illustrated most potently in the case of a shipment of perishable food products. Take the case, for example, of a dealer in fresh fish or early vegetables, where in every case the shipments must be prepared for immediate shipment. A shipper of fresh fish may be assumed to prepare his shipments on a wharf not connected with any railroad siding such as at Boston, for easy illustration. Having a catch amounting to three carloads of fish to be prepared for shipment on the following day, he calls up the agent of the Boston & Maine Railroad and states that he has three cars of fish for shipment to Cincinnati. The agent of the Boston & Maine advises that on account of shortage of cars he can only take one carload. The shipper thereupon calls up the agent of the Boston & Albany and states that he has two carloads of fish for ship-

ment to Cincinnati on the following day. The agent of that line advises that he can only take one. Thereupon the shipper orders the third car from the New York, New Haven & Hartford and is given a car by that line. Note that at the time of making these respective contracts of carriage the shipper has not prepared or iced his shipments, which he thereupon prepares to do and ships the three cars on the following day by the three carriers. If, when he had offered the three cars to the Boston & Maine and had been advised that only one car was available, it was necessary for him to hold the other two cars until the one car had been furnished on the following day by the Boston & Maine, the fish dealer at Boston would have lost the advantage of his location at that competitive point, and the two carloads which had been rejected by the Boston & Maine would be a complete loss to him.

Illustration after illustration might be given to illumine the impracticability of the rule of law contended for. Business is not, and cannot, be conducted at the present time upon any such theory.

Appellant coal operators' Exception XXIII is as follows:

> "That the said District Court erred in not holding that the question whether the aggregate daily rating of a joint mine to order cars from one or both of the carriers serving it shall be measured by its gross daily rating or capacity to produce and tender coal for shipment is a just and reasonable or unjust and unreasonable rating, is one within the administrative functions of the Interstate Commerce Commission and not subject to review by the District Court."

No question of the reasonableness of the rating of a joint mine or local mine was before the Commission or before the Court. The appellant coal operators are foreclosed by their answer from raising this question, either in the court below or here. The bill of complaint alleges, Paragraph IX:

> "The ratings of all mines under said rules represent, for purposes of car distribution, the daily capacity of the mines to produce and ship coal."

It is admitted by the appellant coal operators, both by their motion to dismiss and by the specific admission of the answer, in paragraph III thereof:

> "Intervening defendants admit that the ratings of all mines under the rules now maintained by the said railway defendants represent, for purposes of car distribution, the daily capacities of the mines to produce and ship coal."

The proposition raised in these proceedings is that the Commission is without power to permit by Rule 4 the denial to the appellees of the right to ship that part of their daily capacity to produce and ship coal by the second carrier which has been rejected by the first.

The finding of the Commission has been made on the subject of the rating in the *Bell & Zoller case, supra,* in the following language:

> "The rating of a local mine is determined by taking the total tonnage shipped by the mine during the preceding month over the carrier serving the mine, dividing it by the number of hours worked in producing it, and multiplying the quo-

tient by the number of hours in the recognized workday (not more than 10 hours) of the individual mine. A rating so determined is called the daily rating, as distinguished from the gross daily rating which applies to a joint mine, and which is determined in a similar manner, but by taking the total tonnage shipped over the lines of all the carriers serving the mine."

The sole question before this Commission and the Court is whether, having a capacity to ship of a certain amount fixed by the rating, the carriers or the Commission have a right to deny rights to transportation of the capacity determined under the rating rules.

It is not clear why the appellants should think there was any burden upon the District Court to rule on the question of ratings. The question was not in issue before the Court; the Commission had found that the ratings of the joint mines were determined in the same manner as those of the local mines; the whole question of ratings was an open one before the Commission in another proceeding, and the effect of the order of the District Court was properly to leave that question for determination in the first instance by the Commission, if, indeed, it could be held to be an open question at all.

Appellant coal operators' Exception No. XXIV:

"That the said District Court erred in not holding that a rule which limits the daily orders for cars of a joint mine to 100 per cent of its gross daily rating on both the carriers serving it is required by paragraph 12 of Section 1 of the Interstate Commerce Act."

This question was raised before the Commission and was thus disposed of:

> "Interveners further contend that the first sentence of paragraph (12) of Section 1 requires every carrier, during periods of car surplus, to make a just and reasonable distribution of cars among the mines served by it or customarily dependent upon it for car supply, and leaves the question of what is a just and reasonable distribution of cars to the discretion of the carrier or to us upon complaint and after full hearing, while the second sentence of paragraph (12) specifies the particular manner in which the cars are to be distributed during periods of car shortage and leaves nothing regarding the distribution either to the discretion of the carrier or to us. This sentence does not use the term 'distribution,' but interveners argue that to maintain and apply just and reasonable ratings and to count each and every car furnished to or used by any such mine for transportation of coal against the mine is a mandatory rule of law requiring an exact pro rata distribution of cars in accordance with the prescribed ratings, whether the mine be served by one or more carriers. In view of our conclusions herein, and because the interpretation of paragraph (12) is before us in another proceeding now pending, we will not pass upon that contention here."

The Commission has exhaustively considered the effect of paragraph (12) of Section 1 in other proceedings.

Assignment of Freight Cars, 57 I. C. C., 760.
Assigned Cars for Bituminous Coal Mines, 80 I. C. C., 520.

In both of these cases the Commission reached the conclusion:

> "The Commission is of opinion that paragraph (12) of Section 1 of the interstate commerce act does not change the rule of law laid down in the *Hocking Valley and Traer cases, supra.* The paragraph states in statutory form that which had theretofore been the law, pursuant to the decisions of the Commission and of the Supreme Court of the United States."

Again in the *Assigned Car Case, supra,* the Commission said:

> "While, in the expression of the rule which originated in the *Hocking Valley* and *Traer cases,* the words 'count against the mine' were continually being applied as a necessary term in the formula, it was always recognized that the rule with these words in it was not the equivalent of a requirement for equal proportionate distribution of cars assigned and unassigned to coal mines."

As hereinbefore pointed out, this paragraph of the law, if it has any bearing on the case here in issue, is a direct mandate to the Commission to continue the obligation of the carriers, as it had been before, as a several and not a joint obligation. The language of the statute is directed severally to the carriers. When the coal rejected by the carrier to which it is first offered is offered for shipment to the second carrier, that carrier is required to make a proportionate distribution of its cars in connection with the offers that are received by it from other mines which it serves. We have discussed this proposition in detail earlier in the brief and will not repeat that discussion here.

Nor is the language of paragraph (12) of Section 1 at all inconsistent with this view. That for which the appellees contend is that the cars furnished by the

first carrier to which their coal is offered shall be counted against the rating in order to determine the capacity of the mine to ship over the second carrier and the distributive share which that carrier, is obligated to furnish.

So far from being opposed to the contention of the appellees, the language of paragraph (12) of Section 1 appears rather to support the contention made by the appellees before the Interstate Commerce Commission, namely, that the mine being once rated by each carrier, each carrier was under the obligation to furnish it a proportionate share of cars based on its full rating. The language of the paragraph does not require the carriers to count against the rating cars furnished by another carrier, but it is pefectly consistent with the language of the section that the only cars in contemplation by the section are the cars available to each carrier, and that therefore the requirement that the cars be counted applies only to the available cars of the particular carrier which is determining the supply which it shall furnish.

CONCLUSION.

For the reasons hereinbefore stated and on the authority of the cases cited, the appellees rest confident that the decision and decree of the District Court for the Southern District of West Virginia will be affirmed by this Honorable Court.

Respectfully submitted,

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Counsel for Appellees.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION *v.* NEW RIVER COMPANY ET AL.

SLAB FORK COAL COMPANY ET AL. *v.* NEW RIVER COMPANY ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

Nos. 627 and 628. Argued April 24, 1924.—Decided June 9, 1924.

1. An order of the Interstate Commerce Commission, in form dismissing a complaint of shippers but the effect of which was to require the observance of a rule of car distribution attacked in the proceedings as arbitrary, illegal and unconstitutional, *held* not a "negative" order, (*Procter & Gamble Co.* v. *United States*, 225 U. S. 282, distinguished,) and reviewable in the District Court. P. 539.
2. The courts cannot substitute their judgment for the findings and conclusions of the Commission made within the scope of its power to regulate the distribution of coal cars. P. 541.
3. A rule fixing the number of cars distributable to coal mines in proportion to the daily capacity of each to produce, *held* not arbitrary, unreasonable, or violative of due process, as applied to mines served by more than one carrier. P. 542.

293 Fed. 460, reversed.

APPEALS from a final decree of the District Court enjoining the enforcement of an order of the Interstate Commerce Commission respecting distribution of coal

cars. The suit was brought by the New River Company and other coal mine operators, (appellees), against two railroad companies, the United States and the Commission. Other coal operators intervened to defend the order. The United States and the Commission took one appeal, and the interveners another. The carrier defendants abstained.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

Mr. George T. Bell for appellants in No. 628.

Mr. James W. Carmalt, with whom *Mr. Addison C. Burnham* and *Mr. August G. Gutheim* were on the brief, for appellees.

Mr. J. Carter Fort, with whom *Mr. P. J. Farrell* was on the brief, for the Interstate Commerce Commission.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This suit was brought by the appellees against the Chesapeake & Ohio Railway Company and the Virginian Railway Company, competing interstate carriers by railroad, the United States and the Interstate Commerce Commission to enjoin the carriers from applying a certain rule (Rule 4 of Circular CS-31, Revised) for the distribution of coal cars and to set aside the decision and order of the Commission of December 11, 1922, in certain proceedings instituted by the appellees against the defendant carriers.

For convenience, a mine served by one carrier is called a "local mine", and a mine served by two or more carriers a "joint mine". Each appellee is the operator of a joint mine served by the defendant carriers, and each appellant mining company is the operator of a local mine

served by one or the other of the carriers. The car service rules were promulgated to govern uniformly the "ratings" of coal mines, other than anthracite, and car distribution to such mines during periods of car shortage. The daily rating of a local mine for any month is based on its tonnage shipped during the preceding month, and is identical with its daily capacity to produce coal. The rating of a joint mine is calculated in the same way that the daily rating of a local mine is determined, except that its shipments over all carriers serving it are considered in determining its total capacity to produce coal. The figure so ascertained is called the "gross daily rating," in recognition of the fact that the rating of a joint mine does not represent its capacity to ship over each carrier on days when it uses more than one, but on the contrary represents its total daily capacity to ship over all lines which serve it. Rule 4 provides: "Copies of orders for cars for a mine that is joint with any other carrier (steam, electric, or water) shall be filed with a designated representative of each such carrier. Such combinations must not exceed the gross daily rating of the mine". Under the rules, when a mine orders less than its rating, distribution to it is on the basis of its orders.

These rules were established during the period of federal control of the railroads. After the expiration of that period, the Commission issued a notice, dated March 2, 1920, recommending to carriers and shippers that the rules be continued in effect until experience and further study demonstrated that others would be more effective and beneficial. They were continued by carriers generally. July 8, 1920, the Chesapeake & Ohio Railway Company and the Virginian Railway Company asked for permission to discontinue rule 4 and to substitute for it the "150 per cent. rule", which the Commission in 1912 had found to be a reasonable rule for the Illinois Central Railroad Company (*In re Irregularities in Mine Ratings*, 25

I. C. C. 286, 295), but which had never been followed by the railroads generally or by the defendant carriers. Under this rule, a joint mine may order 100 per cent. of its gross daily rating from either carrier serving it and is entitled to receive its pro rata share of that carrier's available cars. If it so orders, it is not entitled to any cars from the other carrier. In this respect it does not differ from rule 4. However, if a joint mine served by two carriers orders cars from both on the same day, it is entitled to order from each carrier 75 per cent. of its gross daily rating, making its combined orders 150 per cent., but subject to the limitation that it is not entitled to receive in the aggregate more than its gross daily rating. The Commission declined to give permission to substitute the 150 per cent. rule for rule 4.

January 11, 1921, appellees filed separate complaints with the Commission against the Chesapeake and Ohio Railway Company and against the Virginian Railway Company, attacking rule 4 as unjust and unreasonable and unduly prejudicial to joint mines and unduly preferential of local mines. Certain operators of joint mines intervened in support of the complaints. Certain operators of local mines intervened in support of rule 4. The complaints were consolidated with each other and with similar complaints. June 21, 1921, Division 5 of the Commission reported as follows: ". . . We find that rule 4 of Circular CS-31, Revised, is unreasonable and unduly prejudicial to joint mines and unduly preferential of local mines, to the extent that it limits the aggregate orders of the joint mine to 100 per cent. of its rating from both roads; and that for the future during periods of car shortage defendants should distribute cars to the joint mines on their lines here considered on the basis outlined in the Illinois Case [*In re Irregularities in Mine Ratings, supra*] . . ." *Fairmont & Cleveland Coal Co.* v. *Baltimore & Ohio R. R. Co.*, 62 I. C. C. 269, 276. The Com-

mission referred to its authority under § 1 (13) of the Interstate Commerce Act by general or special orders to require carriers by railroad to file their rules and regulations with respect to car service, and to direct that such rules and regulations be incorporated in the schedules showing rates, fares and charges for transportation, and be subject to the provisions of the act relating thereto; and added, "We have not required that car service rules be filed as tariff schedules. We will not in this proceeding direct that the rules which we herein find to be reasonable be so filed. We shall expect, however, that defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies thereof with us." No formal order was entered, but the defendant carriers amended their rules to conform to the findings in the report, and put in force and applied the 150 per cent. rule.

Subsequently, on petition of the intervening operators of the local mines, the case was reopened and considered by the full Commission. December 11, 1922, it reversed the findings of Division 5 and found that rule 4 was not unreasonable or unduly prejudicial. *Bell & Zoller Coal Co.* v. *Baltimore & Ohio Southwestern R. R. Co.*, 74 I. C. C. 433. It said: "Our former conclusions in the Fairmont Case, based upon a mistaken adherence to and extension of the decision in the Illinois Case, are reversed." The Commission made a formal order, reciting that it had "made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof: It is ordered, That the complaints in these proceedings be, and they are hereby, dismissed." Following the report and order, the Chesapeake & Ohio Railway Company and the Virginian Railway Company gave notice to the appellees that they would put rule 4 in effect again.

Thereupon this suit was brought. The complaint alleged that the carriers put the rule in effect because of the order of the Commission, and in fear of the penalties imposed by law for violation of its orders. It attacked the order and rule on the ground that they are beyond the power which the Commission can constitutionally exercise; and are in excess of the power conferred upon it by statute; and that they are arbitrary and unreasonable. The Chesapeake & Ohio Railway Company answered that the effect of the order upon it was necessarily the same as though the order had been in affirmative form, requiring it to cease and desist publishing and observing the Illinois rule (150 per cent. rule) and in lieu thereof to publish and observe rule 4; and that, facing the danger of suits for heavy damages, supported by a decision and reparation orders which it believed would follow its failure to observe the rule prescribed by the Commission, it undertook to cancel the existing rule and to restore rule 4. The Virginian Railway Company answered that in the matter of distribution of cars, it was subject to the orders of the Commission, and that the Commission having decided that rule 4 is not unreasonable or unduly prejudicial, and in the same decision having expressly reversed its conclusion in the *Fairmont Case*, that company considered itself legally bound to put rule 4 in effect on its railroad. The United States and the Interstate Commerce Commission moved to dismiss the complaint for want of jurisdiction and want of equity. The interveners moved to dismiss and later answered.

The case was presented to and heard by a court of three judges. Act of October 22, 1913, c. 32, 38 Stat. 220. The operation of the order of the Commission was stayed and suspended. After trial, final decree was entered setting aside the Commission's order and rule 4 and enjoining the United States, the Commission and the defendant carriers from restricting the rights of appellees in accord-

ance with the order and rule or through any other order or rule to the same effect. 293 Fed. 460. The United States and the Interstate Commerce Commission appealed. No. 627. The interveners appealed. No. 628. The carriers did not appeal.

The questions for decision are: Whether the order was subject to review by the District Court; and, if so, whether it should be set aside.

1. The District Courts have jurisdiction over "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." Act of June 18, 1910, c. 309, 36 Stat. 539; Judicial Code, § 207, Act of March 3, 1911, c. 231, 36 Stat. 1148; Act of October 22, 1913, c. 32, 38 Stat. 219. The appellants contend the order is negative and therefore not subject to review by the court. They cite *Procter & Gamble Co.* v. *United States,* 225 U. S. 282; *Hooker* v. *Knapp,* 225 U. S. 302, and *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412. In the first of these cases, application was made by the Procter & Gamble Company, a shipper and owner of tank cars, to be relieved from paying demurrage charges, in accordance with demurrage rules applied by the carrier. The Commission dismissed the complaint. As shown by the report (19 I. C. C. 556, 560), the reason for dismissal was that the tank cars were made subject to the demurrage rules, by an arrangement between the shipper owning the cars and the carrier hauling them. The question before this Court (p. 292) was whether the Commerce Court had power to exert its own judgment by originally interpreting the administrative features of the Act to Regulate Commerce, and upon that assumption to treat the refusal of the Commission to grant the relief prayed for as an affirmative order, and accordingly to pass on its correctness. *Hooker* v. *Knapp* and *Lehigh Valley R. R. Co.* v. *United States* were decided on the authority of the *Procter & Gamble Case.*

The opinion in that case, when viewed in the light of the report of the Commission, furnishes no support for appellants' contentions here. In all of these cases, affirmative relief sought was denied by the Commission. Judicial review was refused on that ground. The taking of jurisdiction in such cases would involve determination by the courts whether relief denied by the Commission, in the exercise of its powers, should be granted. See *The Chicago Junction Case*, 264 U. S. 258. The authority conferred upon the Commerce Court by § 207 of the Judicial Code was vested in the District Courts by the Act of October 22, 1913, and, like the authority previously exercised by the Federal Circuit Courts, is confined to determining whether the Commission's order violates the Constitution, or exceeds the power delegated by statute, or is an exercise of power so arbitrary as virtually to transcend the authority conferred. *Kansas City Southern Ry. Co.* v. *United States*, 231 U. S. 423, 439; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 483, 489. See also *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547; *Intermountain Rate Cases*, 234 U. S. 476, 490; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 562.

The mere fact that the order of the Commission dismisses the complaint of shippers against rule 4 does not make it a negative order. That rule, promulgated during federal control, was continued in effect upon the recommendation of the Commission until it decided, June 21, 1921, that the rule was unduly prejudicial to joint mines and unduly preferential of local mines, and that the carriers should distribute cars to joint mines on the basis of the 150 per cent. rule. The Commission refrained from making an order that the rule be filed as a tariff schedule, but announced that it expected the carriers

promptly to amend their car service rules to conform with its findings. Accordingly, the carrier ceased to apply rule 4 and applied the 150 per cent. rule in its place. When the case was reopened before the Commission, the contest was between the operators of local mines attacking the 150 per cent. rule and the operators of joint mines supporting that rule and objecting to rule 4. The Commission reversed its former findings and decided in favor of rule 4 and dismissed the complaints assailing that rule. The order expressly includes the findings and conclusions stated in the report. It is not merely negative. Clearly, the order permits and authorizes the carriers to apply rule 4. If that rule is illegal, as alleged, such permission and authority will not sustain it, and suit will lie to set it aside. *The Chicago Junction Case, supra.* Plainly it was the intention and purpose of the Commission that rule 4 should be applied in place of the 150 per cent. rule. The effect of the order is to grant the relief sought by the operators of local mines. We hold that the District Court had jurisdiction.

2. Appellees contend that each operator of a joint mine has a legal right to its fair share of the car supply of each carrier serving the mine; that the operator on any day may offer the prospective output of the mine to any carrier serving it and is entitled on that basis to its share of the carrier's available cars, and that, if any portion of the output remains, the operator may offer it to the second carrier and is entitled to a fair share of that carrier's available cars. This practice is forbidden by rule 4, approved by the order of the Commission. The court below held the order invalid as discriminatory in that it deprived the operator of a joint mine of an advantage to which it has a legal right.

The Interstate Commerce Act confers power on the Commission to regulate the distribution of cars. See § 1, (3), (4), (6), (10), (11), (12), (14); § 3 (1); § 15 (1).

And its jurisdiction over the subject is exclusive. *Interstate Commerce Commission* v. *Illinois Central R. R. Co., supra,* 472; *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.,* 215 U. S. 481, 493; *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.,* 230 U. S. 304, 313; *Pennsylvania R. R. Co.* v. *Puritan Coal Co.,* 237 U. S. 121, 131, 133; *Pennsylvania R. R. Co.* v. *Clark Coal Co.,* 238 U. S. 456, 468; *Pennsylvania R. R. Co.* v. *Stineman Coal Co.,* 242 U. S. 298, 300. The courts will not review determinations of the Commission made within the scope of its powers or substitute their judgment for its findings and conclusions. *Interstate Commerce Commission* v. *Illinois Central R. R. Co., supra,* 470; *Interstate Commerce Commission* v. *Union Pacific R. R. Co., supra,* 547; *Kansas City Southern Ry. Co.* v. *United States, supra,* 456; *United States* v. *Louisville & Nashville R. R. Co.,* 235 U. S. 314, 320; *Manufacturers Ry. Co.* v. *United States, supra,* 488.

Under rule 4, an operator of a local mine is entitled on the basis of its daily rating to its pro rata share of the available cars of the carrier serving it. An operator of a joint mine is not confined to any one carrier serving it. It may order from each carrier, but the total number of cars ordered may not exceed the gross daily rating of the mine. It may select the carrier which at the time has the better car supply and receive its pro rata share of that supply according to its gross daily rating, based on its capacity to ship by all carriers. It may choose between the carriers to secure the service, connections and markets it desires to have. The determination of the Commission in favor of rule 4 cannot be said to be so arbitrary or unreasonable as to transcend the power conferred upon it in respect to car distribution. The contention that the order of the Commission deprives operators of joint mines of their property without due process of law is without merit.

Decree reversed.

MR. JUSTICE McKENNA, dissenting.

Let me state the proposition of the opinion denuded of the confusion of its words. It is that the owner of property—a "joint mine," to use the designation of the case—having available to him the car facilities of two carriers, must yield his advantage or some of it to the owner of a "local mine" (to use the designation of the case) who is not so situated.

I am unable to assent and yet I hesitate to dissent,—certainly hesitate to do so by unsupported declaration. I am, however, puzzled to go beyond declaration. Exposition seems to be that of demonstrating the certainty and self-evidence of an axiom. The doctrine of the opinion is that the Interstate Commerce Commission, and this Court in sustaining it, can take from property an attribute, almost as tangible an attribute as its physical substance—that is, its position, that which avails and makes wealth of its products. This, in my opinion, is a deprivation of property. I repeat, to have it intimately in our attention and estimation, that the doctrine of the opinion is that the owner of a "joint mine" may not avail of the cars accessible to his situation—cars of two carriers—only in a degree—he must yield in other degree the full advantage of his position to the owner of a "local mine" that the latter may have accommodation. And why? Is it the dictate of public interest? And if public interest may so dictate, may it not dictate other constituents and conditions of property,—whatever contributes to its value and is formidable to a competitor?

Position of property is as much a constituent of its value as its composition. A market for its products is as necessary as its products. There must be demand for the products and means of their supply, and both, I repeat, are attributes of property. Indeed, they constitute its value aside from its utility. Take them away or limit

them and you take away or limit its value—its right and exercise—its existence.

Property has adversaries in this world and different forms excite different degrees of antagonism, but we have not yet attained to that subserviency of regulation that one owner of property must surrender the advantage of his position to every other owner, giving up what is of value to him, and what was of cost to him.

And what is the justification—the interest of the public? Is it an exercise of eminent domain? Under the fundamental law it is a condition of the exercise of eminent domain that it recompense the detriment it causes or the property it takes. This would seem so elementary as to require no exposition. If one property owner may be required to share his means of reaching markets with another property owner, why not the markets; and having customers of a definite portion of the alphabet, be required to remand the rest of it to other property owners?

One residing in this town should need no illustration of the advantage of position. One can not step out on the streets without having thrust upon him the evidence of the eager push of business to advantageous positions, recognizing their value and paying with eager competition the increase of price.

According to the doctrine of the opinion, the inducement does not exist in a coal mine, but whatever advantage of instrumentalities it has it must share in the public interest with a competitor. If so, why not all instrumentalities—those it owns as well as those that by its position it is able to obtain.

Nor is the proposition of the opinion justified because it is the disposition of an instrumentality of a public service corporation. I repeat, that an owner of property is entitled in the exercise of his rights and satisfaction of his needs to demand service of the carriers to which he

has relation according to his rights and needs, and in the order of their requisition, and the ability of the carrier.

I concur in the reasoning of Commissioner Potter. "We may not restrict the use of transportation facilities in order to equalize mine operation. To do so would be to require discrimination in the use of equipment—not remove it. If a local mine is at a disadvantage it is not because of a transportation problem with which we may deal. . . ."

The question in the case is made obscure by an attempt at its simplification. It seems the prompt assurance of self evidence that a mine owner with the facilities of two railroads may order such number of cars from both railroads as he may need, this being a right relative to his property, indisputably an element of its value, represented in its price and the cost to him.

I think, therefore, the decree should be affirmed.